south line of Dixie Drive, from said ¾" galvanized iron pipe;

13 Thence in a northeasterly direction curving to the left with the south line of Dixie Drive describing an arc having a radius of 3155.4', a distance of 69.5', to a point from whence the initial point of this description bears south 39° 58 min. west 69.5';

Thence north 68° 20 min. east 963.9';

Thence north 81° 55 min. east 1431.3';

Thence south 89° 03 min. east 1019.4' to a point from whence a 3/8" galvanized iron pipe at the northwest corner of the Mrs. Anna Gill 1-acre tract bears north 54° 14 min. east 354.2';

Thence south 67° 29 min. east 346.5' to a point in the center line of Sims Bayou;

Thence south 22° 31 min. west 33' along the center line of said Bayou to a point;

Thence north 67° 29 min. west 343.4';

Thence north 89° 03 min. west 1010.6';

Thence south 81° 55 min. west 1424.7';

Thence south 68° 20 min. west 1021.1' to the point of beginning.

That the interest sought to be acquired by the petitioner in the foregoing tract of land is perpetual right of way for the construction, operation, maintenance, patrol, repair and replacement of a pipe line or pipe lines for the transportation of petroleum products or any other material or substance that can be transported through a pipeline, and according to information procured by petitioner and believed to be reliable, the following named is the owner or asserts some character of claim against the foregoing tract:

14 1. Rosa Allen Williams, whose address is in care of the Rice Hotel, Houston, Texas.

PARCEL NO. 5

Being a tract of land containing 0.8936 acres more or less, having a width of 33' and a total center line length

of 1179.5', and being out of that certain 17.3 acres of land in the John R. Harris Survey, Abstract 27, in Harris County, Texas, and being the same land conveyed to Marcita Drouet Link by deed dated March 30, 1935, recorded in Volume 855, page 684, Deed Records, Harris County, Texas; said 0.8936 acres being more fully described as follows:

Beginning at a point in the east right-of-way line of Telephone Road, said point being the northwest corner of said 17.3 acres;

Thence north 78° 03 min. east 242' along the north line of said 17.3 acres to a point for the northwest corner and place of beginning of the 0.8936 acre tract herein described;

Thence north 78° 03 min. east 43.9' along said north line to a point;

Thence south 53° 15 min. 327.3';

Thence 83° 00 min. east 827.2' to a point in the east line of said 17.3 acres, said east line being also the west line of the Abbie Dell Drouet Meroney 19.5 acre tract;

Thence south 01° 17 min. west 33.2' along said east line to a point distant north 01° 17 min. east 133.1' along said east line from the southeast corner of said 17.3 acre tract;

Thence north 83° 00 min. west 839.2';

Thence north 53° 15 min. west 365.1' to the point of beginning.

That the interest sought to be acquired by the petitioner in the foregoing tract of land is perpetual right of way for the construction, operation, maintenance, patrol, repair and replacement of a pipe line or pipe lines for the transportation of petroleum products or any other material or substance that can be transported through a pipe line, and according to information procured by petitioner and believed to be reliable, the following named is the owner or asserts some character of claim against the foregoing tract:

1. Marcita Drouet Link, whose place of residence is unknown.

PARCEL NO. 6

Being a tract of land containing 1.9103 acres of land more or less, exclusive of that portion of 0.0989 acres lying in the county road, having a width of 33 ft. and a total center line length of 2652.1 ft. and being out of that certain lot or tract No. 7 of Dixie Land Subdivision being 149.738 acres of H. B. Prentiss Survey Abstract No. 56 in Harris County, Texas, being same land described in deed to A. J. Shudde, et al, recorded in Volume 666, page 101, Deed Records, Harris County, Texas.

Beginning at a point in the west line of said lot No. 7 distant north 12° 22 min. west 341.4 ft. along said west line from the southwest corner, for the southwest corner and place of beginning of the 1.9013 acres of land herein described:

Thence continuing north 12° 22 min. west along said west line 33 ft.;

Thence north 77° 38 min. east 33.2′;

Thence north 59° 49 min. east 2503.4′;

16 Thence north 68° 20 min. east 144.4′ to a point in the center line of a 60 ft. wide curved county road from whence the long cord of the subsequent call bears south 41° west 71.8′; from whence the long cord to the point of compound curvature of said curve bears south 46° 02 min. west 619.9′;

Thence curving to the right along the center line of said curved county road, having a radius of 3125.4′, describing a curve having a degree of curvature of 1° 50 min. and generating a central angle of 1° 19 min., a total distance of 71.8′ to a point from whence the point of compound curvature of said curve bears south 46° 42 min. west 548.5′;

Thence south 68° 20 min. west 78.2′;

Thence south 59° 49 min. west 2506.2′;

Thence south 77° 38 min. west 38.4′ to the point of beginning.

LIBRARY
SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 102

UNITED STATES OF AMERICA, PETITIONER,

vs.

C. M. DOW.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petition for Certiorari
Filed April 11, 1957
Certiorari Granted May 27, 1957

That the interest sought to be acquired by the petitioner in the foregoing tract of land is perpetual right of way for the construction, operation, maintenance, patrol, repair and replacement of a pipe line or pipe lines for the transportation of petroleum products or any other material or substance that can be transported through a pipe line, and according to information procured by petitioner and believed to be reliable, the following named is the owner or asserts some character of claim against the foregoing tract:

1. A. J. Shudde, whose address is 4510 Woodside, Houston, Texas.

17 PARCEL NO. 7-A

Being a tract of land containing 2.8507 acres more or less, having a width of 33' and a total center line length of 3762.87' and being out of that certain 489.24 acres of land more or less in the Callahan and Vince Leagues, Abstract 9, being the same land described in deed to the Estate of Rosa C. Allen, deceased, recorded in Volume 1056, page 325, Deed Records of Harris County, Texas, said 2.8507-acre tract more particularly described as follows:

Beginning at a point in the east or northeast line of certain 22' wide right-of-way conveyed to Houston Lighting & Power Company as tract 1 by deed dated April 15, 1925, and recorded in Volume 612, page 106, Deed Records of Harris County, Texas, said point being also the east or northeast corner of a certain 1-acre tract heretofore conveyed to G. H. Threadgill by deed recorded in Volume 1136, page 633, Deed Records of Harris County, Texas,

Thence N. 55° 47' W. 33.00 ft. along the north line of said 1-acre tract to a point.

Thence N. 34° 13' E. 3770.92 ft. parallel with and 33.00' perpendicular to said 22 ft. wide Houston Lighting & Power Company's right-of-way to a point in the west or southwest line of Allen Genoa road.

Thence S. 29° 46′ E. 36.72′ along said west line to the east or northeast corner of said Houston Lighting & Power Company's 22′ wide right-of-way.

Thence S. 34° 13′ W. 3754.82′ along the west or northwest line of said 22 ft wide tract to the point of beginning.

18 That the interest sought to be acquired by the petitioner in the foregoing tract of land is perpetual right of way for the construction, operation, maintenance, patrol, repair and replacement of a pipe line or pipe lines for the transportation of petroleum products or any other material or substance that can be transported through a pipe line, and according to information procured by petitioner and believed to be reliable, the following named is the owner or asserts some character of claim against the foregoing tract:

1. Estate of Rosa C. Allen, deceased, address unknown.

PARCEL NO. 7-B

Being a tract of land containing 3.7648 acres more or less having a width of 33′ and a total center line length of 4969.57′ and being out of those certain 489,24 acre and 484.69 acre tracts of land in the Callahan and Vince Leagues, Abstract 9 and the William Vince League, Abstract 78, being the same land described in deed to the Estate of Rosa C. Allen, deceased, recorded in Volume 1056, page 325, Deed Records of Harris County, Texas.

Beginning at a point in the east or northeast line of the Allen Genoa road, said point being also the west or northwest corner of a certain 22′ wide right-of-way conveyed to Houston Lighting & Power Company as Tract 2 by deed dated April 15, 1925, and recorded in Volume 612, page 106, Deed Records of Harris County, Texas.

Thence N. 29° 46′ W. 36.72′ along said east line of the Allen Genoa road to a point.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 102

UNITED STATES OF AMERICA, PETITIONER,

vs.

C. M. DOW.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX

	Original	Print
Record from the United States District Court for the Southern District of Texas		
Appellant's amended designation of contents of record on appeal	1	1
Designation of appellee	2	2
Caption	4	3
Petition in condemnation	5	3
Judgment on declaration of taking	23	17
Second amendment to petition in condemnation	29	22
Order allowing filing of second amendment to petition in condemnation	31	24
Plaintiff's motion to set aside Commissioners' award and direct a rehearing	31	24
Exhibit "A"—Order of possession	36	28
Exhibit "B"—Affidavit of M. W. Lee	39	31
Exhibit "C"—Affidavit of Houston Bank & Trust Company, et al.	40	32

Thence 34° 13′ E. 429.04′ parallel with and 33′ perpendicular to the west or northwest right-of-way line of said 22′ wide right-of-way to a point.

Thence N. 42° 02′ E. 4553.14′ parallel with and 33′ perpendicular to said west or northwest line of said 22′ wide right-of-way to a point in the west line of Van Dorn road.

Thence S. 00° 11′ W. 49.46′ along said west line to north corner of said 22′ wide Houston Lighting & Power Company's right-of-way.

Thence S. 42° 02′ W. 4514.05′ along the west or northwest line of said 22′ wide right-of-way to a point.

Thence S. 34° 13′ W. 442.90′ along said west or northwest line of said 22′ wide right-of-way to the point of beginning.

That the interest sought to be acquired by the petitioner in the foregoing tract of land is perpetual right of way for the construction, operation, maintenance, patrol, repair and replacement of a pipe line or pipe lines for the transportation of petroleum products or any other material or substance that can be transported through a pipe line, and according to information procured by petitioner and believed to be reliable, the following named is the owner or asserts some character of claim against the foregoing tract:

1. Estate of Rosa C. Allen, deceased, address unknown.

That in addition to the foregoing, the following are believed to assert some character of claim or lien against all of the foregoing tracts of land, to wit:

State of Texas
Harris County, Texas

VIII.

The estate taken for said public uses and purposes is as follows: perpetual right-of-way for the above specified purposes as to all of said tracts.

	Original	Print
Exhibit "D"—Letter dated November 8, 1948 from Commissioners to U.S. District Attorney	47	37
Exhibit "E"—Affidavit of Scott W. Key	48	38
Entry made by Judge Kennerly on motion calendar	50	39
Motion for summary judgment dismissing the claim of C.M. Dow	50	39
Exhibit "1"—Letter dated November 8, 1948 from Commissioners to U.S. District Attorney	55	43
Exhibit "2"—Affidavit of Scott W. Key	56	44
Motion of Houston Bank & Trust Company, Trustee, et al., to withdraw waiver and to claim proceeds of condemnation award	57	44
Summary judgment dismissing C.M. Dow as a party defendant	61	48
Exhibit "A"—Affidavit of Houston Bank & Trust Company, including deed to property	67	53
Order setting aside award of Commissioners	73	58
Notice of appeal by C.M. Dow	75	59
Cost bond on appeal (omitted in printing)	76	60
Statement of points on appeal	77	60
Stipulation for a supplemental record	78	60
Defendant, C.M. Dow's answer to motion for a summary judgment dismissing the claim of said defendant	79	61
Clerk's certificate (omitted in printing)	82	63
Proceedings in the United States Court of Appeals for the Fifth Circuit	83	63
Argument and submission (omitted in printing)	83	63
Opinion, Rives, J.	84	64
Judgment	90	68
Petition of appellee for rehearing and request that such hearing be had en banc	91	68
Order denying rehearing	99	74
Clerk's certificate (omitted in printing)	100	75
Order extending time to file certiorari	101	75
Order granting certiorari	102	75

IX.

The information acquired by the petitioner indicates that the parties hereinabove named are the reputed owners or are the claimants of some interest hereinbefore described, and they are made parties-defendant herein.

X.

That in addition to all of the parties named above, there may be other persons who may own some part of, or may have some interest in some part of, or lien or encumbrance on or against said land, or claiming or holding some right, title or interest therein whose names are unknown, and petitioner avers that reasonable diligence has been used to ascertain the same without success, and that all persons, firms, or corporations, known or unknown, having any right, title, interest, demand, lien, encumbrance or claim of any kind or character whatsoever are made parties-defendant to this action.

WHEREFORE, your petitioner prays that this Honorable Court will take jurisdiction of this cause and will forthwith appoint three disinterested freeholders out of the county of Harris, State of Texas, as Commissioners to appraise and fix the value of said lands and the amount of compensation to which the owners thereof are entitled for such appropriation by the petitioner herein
21 and to issue notice of the proceeding as required by law, and will make and have entered all such orders, judgments and decrees as may be necessary to bring all of the unknown owners of said land before this Court, and to make all unknown persons, firms and corporations, having or claiming any interest therein, parties-defendant herein, all as provided by law.

Your petitioner further prays that an order may be entered in this cause providing, authorizing and directing the United States of America, the petitioner herein, to take immediate possession of each and all of the lands and the various interests therein as hereinbefore set out to the extent of the interest to be acquired by the United States of America and proceed with such public works thereon as have been authorized by Congress as above alleged.

Your petitioner further prays that this Honorable Court will make and have entered all such further orders, judgments and decrees as may be necessary to vest the entire and unencumbered interest being condemned in and to the lands hereinabove described in the United States of America upon payment into the registry of the Court of a just compensation therefor, and to make just distribution of the final award among those entitled thereto as expeditionsly as possible, and to grant such other and further relief, general and special, to which your petitioner may be entitled.

UNITED STATES OF AMERICA,
By DOUGLAS W. MCGREGOR,
United States Attorney
H. L. LEWIS
H. L. Lewis
Special Assistant to the
United States Attorney

22 Duly sworn to by H. L. Lewis
(Jurat omitted in printing)

23 IN UNITED STATES DISTRICT COURT

Judgment on Declaration of Taking—Filed, May 31, 1946

This cause coming on to be heard upon the motion of petitioner, United States of America, to enter a judgment on the Declaration of Taking filed in this cause on May 31, 1946, and upon consideration thereof and of the condemnation petition filed herein, said Declaration of Taking, the statutes in such cases made and provided, and it appearing to the satisfaction of the Court:

First, that the United States of America is entitled to acquire property by eminent domain for the purposes as set out and prayed for in said petition.

Second, that said petition in condemnation was filed at the request of the Secretary of the Reconstruction Finance Corporation, the authority empowered to acquire the lands described in said petition, and also under the authority of the Attorney General of the United States; and that heretofore on March 9, 1943, this Court entered and filed an

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

Appellant's Amended Designation of Contents of Record on Appeal—Filed, April 25, 1956

C. M. DOW, defendant herein, hereby designates under Rule 75 of the Federal Rules of Civil Procedure the following to constitute the Transcript of Record on Appeal in the above entitled case.

1. Petition in Condemnation filed March 9, 1943.
2. Judgment on Declaration of Taking filed May 31, 1946.
3. Second Amendment to Petition in Condemnation filed October 3, 1946.
4. Summary Judgment Dismissing C. M. Dow as a Party Defendant, dated March 29, 1956.
5. C. M. Dow's Notice of Appeal and Bond.
6. Statement of Points to be Relied Upon by Appellant, C. M. Dow.
7. This Amended Designation of Contents of Record on Appeal.

FULBRIGHT, CROOKER, FREEMAN, BATES & JAWORSKI

By L. KEITH SIMMER
L. Keith Simmer
1201 South Coast Life Bldg.
Houston 2, Texas
Attorneys for Appellant, C. M. Dow

order granting to the United States of America immediate possession of the hereinafter described property, along with other property.

Third, that said petition and said declaration of taking state the authority under which and the public uses for which said lands were taken; that the Secretary, or the Assistant Secretary, of the Reconstruction Finance Corporation are duly authorized and empowered by law to acquire such lands such as are described in the petition and in said declaration of taking; that the Attorney General of the United States of America is the person authorized by law to direct the institution of such condemnation proceedings.

Fourth, that a proper description of the lands sought to be taken sufficient for identification thereof, is set out in said declaration of taking.

Fifth, that said declaration of taking contains a statement of the estate or interest in said land taken for said public use.

Sixth, that a plat showing the lands taken is incorporated in said declaration of taking.

Seventh, that a statement is contained in said declaration of taking showing a sum of money estimated by said acquiring authority to be just compensation for said lands, and that said sum was deposited in the registry of this Court for the use of the persons entitled thereto upon and at the time of the filing of said declaration of taking.

Eighth, that a statement, is contained in said declaration of taking that the amount of the ultimate award of compensation for the taking of said property, in the opinion of the acquiring authority, will be within any limits prescribed by Congress as to the price to be paid therefor.

It is, therefore, ORDERED, ADJUDGED and DECREED that upon the filing of said declaration of taking, and the depositing in the registry of this Court of the sum of $3,801.30, a perpetual right-of-way or easement for the construction, operation, maintenance, patrol, repair, replacement and removal of a pipe line, or pipe lines, for the

2 **Certificate of Service**

(omitted in printing)

IN THE UNITED STATES DISTRICT COURT

Designation of Appellee—Filed April 24, 1956

NOW COMES Appellee, United States of America and, in addition to the matters designated by Appellant, C. M. Dow, hereby designates the additional instruments to be included in the record of the appeal by C. M. Dow, to-wit:

1. Motion filed October 6, 1949 by the United States of America for an Order Setting Aside Report of Commissioners.

2. Entry made by Judge Kennerly on Motion Calendar on November 1, 1949.

3. Order dated April 3, 1956, Setting Aside Award of Commissioners.

4. Motion filed May 6, 1955 by United States of America for Summary Judgment Dismissing Claim of C. M. Dow.

3 5. Motion filed the 5th day of March, 1956, by Houston Bank & Trust Company, et al, Withdrawing Waiver and Claiming Compensation.

UNITED STATES OF AMERICA
By /s/ SCOTT W. KEY
Assistant United States Attorney

Certificate of Service

(omitted in printing)

transportation of petroleum products or any other material or substance which can be transported through a pipe line, in, over and across the following described tracts of land:

EXHIBIT "A"

Humble Pipe Line Co.
P. 1537

The land which shall be the subject matter of condemnation proceedings is situate in Harris County, State of Texas, and is more particularly described as follows:

PARCEL NO. 1

Being a tract of land containing 2.7139 acres more or less, having a width of 33′ and a total center line length of 3582.3′ and being out of that certain 616 acres of land more or less in the John R. Harris survey, Abstract 27, Harris County, Texas, and being the same land conveyed to James Bute and John F. Garrett by deeds recorded in Volume 240, pages 376, 377, and 378, deed records, Harris County, Texas, said 2.7139 acre tract more fully described as follows:

Beginning at a point in the west line of said 616 acres, said point being the northeast corner of Broadview Addition, a sub-division of 256.77 acres of land in the southwest corner of the John R. Harris survey recorded in Volume 7, page 24, of the map records of Harris County, Texas, said northeast corner being also the southwest corner of the Abbie Dell Drouet Meroney 19.5 acre tract recorded in Volume 855, page 728, deed records, Harris County, Texas;

Thence north 0° 30 min. east along said west line 40.2′ to a point for the southwest corner and place of beginning of the 2.7139 acre tract herein described;

Thence south 76° 05 min. east 3582.2′ to a point in the east line of said 616 acres, said east line being also the west line of the Meadowbrook Development Company land;

Thence north 0° 55 min. east along said east line 33.9′ to a point distant south 0° 55 min. west 3228.1′

4 IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOLDING SESSIONS AT HOUSTON

No. 955 Civil Action

United States of America, *Plaintiff*

-vs-

15.8753 Acres of land, More or Less, in Harris County, Texas, and James Bute, et al., *Defendants*

CAPTION

BE IT REMEMBERED: That in the above entitled and numbered cause, lately pending in said Court, in which a Summary Judgment Dismissing C. M. Dow as a Party Defendant was rendered at the Regular February 1956 Term of said Court, to-wit:

On the 29th day of March A. D. 1956, the Honorable Ben C. Connally, Judge of the United States District Court for the Southern District of Texas, presiding, the following proceedings were had, to-wit:

* * * * * * * * * * *

5 IN THE UNITED STATES DISTRICT COURT

Petition in Condemnation—Filed, March 9, 1943

To the Honorable the Judges of the United States District Court for the Southern District of Texas:

Now comes the United States of America, a sovereign, petitioner herein, by and through Douglas W. McGregor, United States Attorney, and H. L. Lewis, Special Assistant to the United States Attorney, for the Southern District of Texas, and at the direction and under the authority of the Attorney General of the United States, pursuant to the request of the Administrator of the Federal Works Agency of the United States, and represents to the Court:

from a 1" iron pipe set in the southwest right-of-way line of the old Galveston-Harrisburg electric railroad, marking a north corner of the Meadowbrook Development Company's land and a northeast corner of the 616 acre tract above mentioned;

Thence north 76° 05 min. west 3581.1';

Thence north 83° 0 min. west 1.3', to a point in the west line of said 616 acres;

Thence south 0° 30 min. west 33.8' to the point of beginning.

PARCEL NO. 7-A

Being a tract of land containing 2.8507 acres more or less, having a width of 33' and a total center line length of 3762.87' and being out of that certain 489.24 acres of land more or less in the Callahan and Vinee Leagues, Abstract 9, being the same land described in deed to the Estate of Rosa C. Allen, deceased, recorded in Volume 1056, page 325, Deed Records of Harris County, Texas, said 2.8507-acre tract more particularly described as follows:

Beginning at a point in the east or northeast line of a certain 22' wide right-of-way conveyed to Houston Lighting & Power Company as tract 1 by deed dated April 15, 1925, and recorded in Volume 61[illegible], page 106, Deed Records of Harris County, Texas, said point being also the east or northeast corner of a certain 1-acre tract heretofore conveyed to G. H. Threadgill by deed recorded in Volume 1136, page 633, Deed Records of Harris County, Texas.

27 Thence N. 55° 47' W. 33.00 ft. along the north line of said 1-acre tract to a point.

Thence N. 34° 13' E. 3770.92 ft. parallel with and 33.00' perpendicular to said 22 ft. wide Houston Lighting & Power Company's right-of-way to a point in the west or southwest line of Allen Genoa road.

Thence S. 29° 46' E. 36.72' along said west line to the east or northeast corner of said Houston Lighting & Power Company's 22' wide right-of-way.

I.

That this petition is filed under and by virtue of the Acts of Congress authorizing the filing of same, some of which are as follows:

The Act of August 1, 1888, (25 Stat. 357 (40 U. S. C., Section 257);

The Act of October 14, 1940 (Public No. 849, 76th Congress), as amended by the Act of June 28, 1941 (Public No. 137, 77th Congress), 50 U. S. C., Section 171, as supplemented by Title II of the Second War Power's Act, 1942, and Executive Order No. 9186, and pursuant to the provisions contained in the Act of Congress, approved January 22, 1932 (15 U. S. C. 601-617) as amended by Public Law No. 507—77th Congress, approved March 27, 1942, and Executive Order No. 9217 issued by the President of the United States on August 7, 1942, by virtue of and pursuant to authority vested in Title II of the Second War Powers Act of 1942.

II.

That the public uses for which the hereinafter described lands and interests are to be acquired as follows: The said lands and interests therein are necessary for the construction, operation, maintenance, patrol, repair and replacement of a pipe line or pipe lines for the transportation of petroleum products or any other material or substance that can be transported through a pipe line, and said lands and the interests in said lands have been selected for use in connection with the construction, operation, maintenance, patrol, repair and replacement of a pipe line or pipe lines and for such other uses as may be authorized by Congress.

III.

That under the authority of said Executive Order No. 9217, the Administrator of the Federal Works Agency has selected for acquisition by the United States of America the interests in the lands hereinafter described, and has designated that said lands and the hereinafter specified title and interests in said lands are suitable for the purpose.

Thence S. 34° 13′ W. 3754.82′ along the west or northwest line of said 22 ft. wide tract to the point of beginning.

PARCEL NO. 7-B

Being a tract of land containing 3.7648 acres more or less having a width of 33′ and a total center line length of 4669.57′ and being out of those certain 489.24 acre and 484.69 acre tracts of land in the Callahan and Vince Leagues, Abstract 9 and the William Vince League, Abstract 78, being the same land described in deed to the Estate of Rosa C. Allen, deceased, recorded in Volume 1056, page 325, Deed Records of Harris County, Texas.

Beginning at a point in the east or northeast line of the Allen Genoa road, said point being also the west or northwest corner of a certain 22′ wide right-of-way conveyed to Houston Lighting & Power Company as Tract 2 by deed dated April 15, 1925, and recorded in Volume 612, page 106, Deed Records of Harris County, Texas.

Thence N. 29° 46′ W. 36.72′ along said east line of the Allen Genoa road to a point.

Thence 34° 13′ E. 429.04′ parallel with and 33′ perpendicular to the west or northwest right-of-way line of said 22′ wide right-of-way to a point.

28 Thence N. 42° 02′ E. 4553.14′ parallel with and 33′ perpendicular to said west or northwest line of said 22′ wide right-of-way to a point in the west line of Van Dorn road.

Thence S. 00° 11′ W. 49.46′ along said west line to north corner of said 22′ wide Houston Lighting & Power Company's right-of-way.

Thence S. 42° 02′ W. 4514.05′ along the west or northwest line of said 22′ wide right-of-way to a point.

Thence S. 34° 13′ W. 442.90′ along said west or northwest line of said 22′ wide right-of-way to the point of beginning.

of the United States of America, and that said selection, designation and determination have been and are now in full force and effect.

IV.

That the Congress of the United States of America has appropriated and made available funds for the acquisition of such lands and interests therein and the establishment of said project.

7

V.

That under proper acts of Congress and said Executive Order No. 9217, the Administrator of the Federal Works Agency has determined and is of the opinion that it is useful, appropriate, necessary, advantageous and to the interest of the United States of America to acquire the hereinafter specified title and interests to land as hereinafter described by condemnation under judicial process, and has made application to the Attorney General of the United States of America to cause such proceedings to be commenced, in pursuance of which application the Attorney General of the United States has instructed and directed the United States Attorney for the Southern District of Texas to institute this proceeding.

VI.

That the United States of America institutes this proceeding to acquire said land and interests therein at a fair, reasonable just compensation.

VII.

That the land and interests in said land sought to be acquired by this proceeding consist of eight parcels, aggregating 15.8753 acres of land in Harris County, Texas, said tracts together with the reputed and purported owners and claimants thereof, and the interests sought to be acquired therein being described by metes and bounds as follows:

PARCEL NO. 1

Being a tract of land containing 2.7139 acres more or less, having a width of 33′ and a total center line length of 3582.3′ and being out of that certain 616

ESTIMATED JUST COMPENSATION

Parcel No. 1	$1,151.30
Parcels No. 7-A and 7-B	$2,650.00

vested in the United States of America upon the filing of said declaration of taking and the depositing in the registry of the court of the said estimated compensation, and said lands are deemed to have been condemned and taken for the use of the United States of America, and the rights to just compensation for the property taken, upon the filing of said declaration of taking and the making of said deposit, vested in the persons entitled thereto, and the amount of compensation shall be ascertained and awarded in this proceeding and established by judgment herein pursuant to law; and

That the United States of America has taken possession of the above described premises under and by virtue of said order of possession heretofore mentioned, and
29 this cause is held open for such other and further orders, judgments and decrees as may be necessary in the premises.

ORDERED at Houston, Texas, this the 31 day of May, 1946.

/s/ T. M. KENNERLY,
United States District Judge

IN UNITED STATES DISTRICT COURT

Second Amendment to Petition in Condemnation—Filed October 3, 1946

TO THE HONORABLE T. M. KENNERLY, UNITED STATES DISTRICT JUDGE:

COMES NOW petitioner, United States of America, and respectfully represents and shows to the Court that since the filing of the original Petition in Condemnation herein, information gained by petitioner, and believed to be reliable, reflects that certain persons, firms and concerns who have not been made party defendant to this proceeding own, claim or assert some character of right, title or interest in and to the tracts of land in this proceeding

acres of land more or less in the John R. Harris survey, Abstract 27, Harris County, Texas, and being the same land conveyed to James Bute and John F. Garrott by deeds recorded in Volume 240, pages 376, 377, and 378, deed records, Harris County, Texas, said 2.7139 acre tract more fully described as follows:

Beginning at a point in the west line of said 616 acres, said point being the northeast corner of Broadview Addition, a subdivision of 256.77 acres of land in the southwest corner of the John R. Harris survey recorded in Volume 7, page 24, of the map records of Harris County, Texas, said northeast corner being also the southwest corner of the Abbie Dell Drouet Mcroney 19.5 acre tract recorded in Volume 855, page 728, deed records, Harris County, Texas;

Thence north 0° 30 min. east along said west line 40.2′ to a point for the southwest corner and place of beginning of the 2.7139 acre tract herein described;

Thence south 76° 05 min. east 3582.2′ to a point in the east line of said 616 acres, said east line being also the west line of the Meadowbrook Development Company land;

Thence north 0° 55 min. east along said east line 33.9′ to a point distant south 0° 55 min. west 3228.1′ from a 1″ iron pipe set in the southwest right-of-way line of the old Galveston-Harrisburg electric railroad, marking a north corner of the Meadowbrook Development Company's land and a northeast corner of the 616 acre tract above mentioned;

Thence north 76° 05 min. west 3581.1′;

Thence north 83° 0 min. west 1.3′, to a point in the west line of said 616 acres;

Thence south 0° 30 min. west 33.8′ to the point of beginning.

That the interest sought to be acquired by the petitioner in the foregoing tract of land is perpetual right of way for the construction, operation, maintenance, patrol, repair and replacement of a pipe line or pipe lines for the transporta-

tion of petroleum products or any other material or substance that can be transported through a pipe line, and according to information procured by petitioner and believed to be reliable, the following named are the owners or assert some character of claim against the foregoing tract:

1. James Bute, whose address is c/o James Bute Co., 1301 McKinney, Houston, Texas

2. John F. Garrott, whose place of residence is unknown

PARCEL NO. 2

Being a tract of land containing 0.2302 acres more or less, having a width of 33′ and a total center line length of 303.8′ and being out of the northwest corner of that certain E. N. Drouet original 353 acre tract in the J. R. Harris Survey, Abstract 27, Harris County, Texas, recorded in Volume 612, page 167, Deed Records, Harris County, Texas, lying east of Telephone Road and between the north line of a 17.3 acre tract conveyed to Marcita Drouet Link and Sims Bayou; said 0.2302 acre tract more fully described as follows:

Beginning at a point in the east right-of-way line of Telephone Road, said point being also the northwest corner of a certain 17.3 acre tract of land conveyed to Marcita Drouet Link by deed recorded in Volume 855, page 684, Deed Records, Harris County, Texas;

Thence north 01° 17 min. east 201′ along the east line of Telephone Road, being also the west line of the E. N. Drouet tract to a point for the most northerly southwest corner and place of beginning of the 0.2302 acre tract herein described,

Thence continuing north 01° 17 min. east 35.4′ along said west line to a point;

Thence south 67° 29 min. east 91.3′;

Thence south 53° 15 min. east 237.6′, to a point in the common line between the E. N. Drouet tract and the Marcita Drouet Link 17.3 acres;

designated as Parcels Nos. 1, 7A and 7B in the pleadings filed herein by petition, and that it is necessary in order to properly and completely effectuate the condemenation of said lands that such additional persons and concerns be made parties to this cause of action.

Therefore, with leave of the Court, petitioner files this its Second Amendment to Petition in Condemnation, and by such Amendment makes the following persons and concerns defendant in this proceeding the same as if they had been named in petitioner's original Petition in Condemnation and other pleadings filed herein, said additional persons, concerns and firms being as follows: C. M. Dow; Houston Bank & Trust Company (formerly Houston Land & Trust Company) as Independent Executor and Trustee under the will and of the Estate of John F. Garrott, deceased; Bertha B. Day, a feme sole; Dorothy Elizabeth Franklin, a feme sol; Agnes B. Nickle and husband, Donald C. Nickle; Guardian Trust Company, as Executor and Trustee under the will and of the Estate of Alevia Bute Hill, deceased; James Bute III; Mary Elizabeth Nemeth and husband, Theodore J. Nemeth; John Bute; Lois Bute Porter and husband, Randon Porter, Jr.; Gulf Refining Company; Sinclair Refining Company; S. M. Briscoe; Gulf Pipe Line Company; Houston Lighting and Power Company; and Sinclair-Texas Pipe Line Company.

In all other respects the pleadings herein previously filed shall remain in full force and effect, and the relief therein sought is now prayed for as against all of the above named parties as was sought against the persons named and included in the previous pleadings filed herein by petitioner.

UNITED STATES OF AMERICA, Petitioner,

By /s/ BRIAN S. ODEM
Brian S. Odem
United States Attorney

By /s/ H. L. LEWIS
H. L. Lewis
Special Assistant

Thence south 78° 03 min. west 43.9′ along said common line to a point distant north 78° 03 min. east 242′ along said common line from the above mentioned common corner lying in the east line of Telephone Road;

Thence north 53° 15 min. west 204.5′;

Thence north 67° 29 min. west 74.3′, to the point of beginning.

That the interest sought to be acquired by the petitioner in the foregoing tract of land is perpetual right of way for the construction, operation, maintenance, patrol, repair and replacement of a pipe line or pipe lines for the transportation of petroleum products or any other material or substance that can be transported through a pipe line; and according to information procured by petitioner and believed to be reliable, the following named is the owner or asserts some character of claim again the foregoing tract:

11 1. E. N. Drouet, whose address is 4773 Calhoun Road, Houston, Texas.

PARCEL NO. 3

Being a tract of land containing 0.6466 acres more or less, having a width of 33′ and a total center line length of 853.5′ and being out of that certain 19.5 acres of land in the J. R. Harris Survey, Abstract 27, Harris County, Texas, and being the same land conveyed to Abbie Dell Drouet Meroney by deed dated March 30, 1935, and recorded in Volume 855, page 728, deed records of Harris County, Texas; said 0.6466 acre tract more fully described as follows:

Beginning at a point in the west line of said 19.5 acres, said west line being also the east line of the Marcita Drouet Link 17.3 acre tract, said point being distant north 01° 17 min. east 133.1′ along said west line from the southwest corner of said 19.5 acre tract;

Thence north 01° 17 min. east 33.2′ along said west line to a point;

Thence south 83° 00 min. east 853.2′ to a point in the east line of said 19.5 acres; said east line being also the west line of the James Bute Estate lands;

31 IN UNITED STATES DISTRICT COURT

Order Allowing Filing of Second Amendment to Petition in Condemnation—Filed, Oct. 3, 1946

Pursuant to the request of the United States of America, petitioner herein, leave is hereby granted to file the above and foregoing Second Amendment to the original Petition in Condemnation.

/s/ T. M. KENNERLY
United States District Judge

DONE at Houston, Texas,
this 3 day of October, 1946.

IN UNITED STATES DISTRICT COURT

Plaintiff's Motion to Set Aside Commissioners' Award and Direct a Rehearing—Filed, October 6, 1949

Now comes petitioner, United States of America, and respectfully shows to the Court:

1. That petition in condemnation in the above-numbered and styled cause was filed on March 9, 1943, for the purpose of condemning permanent right-of-way easements for oil and gas pipe lines across eight tracts of land in Harris County, Texas, including one right-of-way easement of 2.7139 acres designated as Parcel No. 1 in said proceeding.

2. That on the date of the filing of said petition, to wit, March 9, 1943, petitioner requested of and secured from the United States District Judge an order granting
32 to petitioner immediate possession of the lands described in said petition, including said Parcel No. 1 and a copy of said order of possession is hereto attached, marked "Exhibit A" and made a part hereof.

3. That within ten days after the date of said order of possession, Petitioner, United States of America, or parties acting under and at the direction of petitioner, entered into the actual physical possession of the 2.7139 acres of land designated as Parcel No. 1 in this proceeding and commenced laying a pipe line for oil or gas thereon; that the laying of said pipe line in and along said Parcel No. 1

Thence south 0° 30 min. west 33.8′ along said east line to a point distant north 0° 30 min. east 40.2′ along said east line from the southeast corner, said southeast corner being also the northeast corner of Broadview Addition;

Thence north 76°05 min. west 4.5′;

Thence north 83° 00 min. west 849.3′ to the point of beginning.

12 That the interest sought to be acquired by the petitioner in the foregoing tract of land is perpetual right of way for the construction, operation, maintenance, patrol, repair and replacement of a pipe line or pipe lines for the transportation of petroleum products or any other material or substance that can be transported through a pipe line, and according to information procured by petitioner and believed to be reliable, the following named is the owner or asserts some character of claim against the foregoing tract:

1. Abbie Dell Drouet Meroney, whose place of residence is unknown.

PARCEL NO. 4

Being a tract of land containing 2.8652 acres of land more or less, having a width of 33 ft. and a total center line length of 3782′ and being out of that certain 111.94 acres of land in the H. B. Prentiss Survey, Abstract 56 in Harris County, Texas, and being the same land conveyed as Tract One to Rosa Allen Williams by Partition deed dated September 23, 1942, recorded in Volume 1256, page 421, Deed Records of Harris County, Texas, the said 2.8652 acre tract being more particularly described as follows:

Beginning at a point in the most northerly northwest line of said 111.94 acres, said northwest line being also the south line of the south loop of Dixie Drive from whence a ¾″ iron pipe marking the west corner of said 111.94 acre tract bears south 41° 44 min. west 124.6′ said point being distant 124.6′ measured along a curve having a radius of 3155.4′, described by said

was completed in the year 1943 and said pipe line has been continuously used since its completion for the transportation of oil or gas. That petitioner offers the affidavit of M. W. Lee in support and proof of the facts alleged in this paragraph which affidavit is hereto attached, marked "Exhibit B" and made a part hereof.

4. That on May 31, 1946, petitioner filed its Declaration of Taking of all of the lands involved in this proceeding and on said date deposited a sum of money in the registry of the court as the estimated compensation for the taking of said Parcel No. 1, all of which is apparent from the record in this cause.

5. That at the time of the commencement of this proceeding said Parcel No. 1 was out of and a part of a large tract of 617.289 acres belonging to the estate of and heirs of John F. Garrott, deceased, and the estate of and heirs of James Bute, deceased; that thereafter, by deed dated November 1, 1945, the Independent Executor under the will of John F. Garrott, deceased, and the heirs of James Bute, deceased conveyed said 617.289 acres of land to
33 the defendant herein, C. M. Dow. A copy of said deed is hereto attached marked "Exhibit C" and made a part hereof.

6. That on November 2, 1948, the Commissioners appointed by this Court held a hearing for the purpose of determining the compensation and damages due by the United States of America for the taking of said Parcel No. 1, and on November 16, 1948, filed in this court their written report and award, copy of which is hereto attached, marked "Exhibit D" and made a part hereof.

7. That the defendant, C. M. Dow, pursuant to notice served on him, and his attorney appeared at said Commissioners' hearing and offered evidence as to the value of said Parcel No. 1; that no other persons or their attorneys appeared at such hearing and that no other persons or concerns (except Houston Lighting & Power Company, Gulf Refining Company and Sinclair Refining Company, as owners of conflicting easements) were served with notice of such hearing as the attorney representing the United States of America as such hearing was then under the im-

pression that any parties other than C. M. Dow, deriving title through James Bute, deceased, and John F. Garrott, deceased, had no interest in said Parcel No. 1 and were not entitled to any compensation for the taking of the same. The facts alleged in this paragraph and the following paragraph are verified by the affidavit of Scott W. Key as Assistant to the United States Attorney, which affidavit is hereto attached marked "Exhibit E" and made a part hereof.

8. That, after a more thorough investigation of the law governing such matters, the attorney for petitioner, United States of America, has now reached the conclusion
34 that the defendant, C. M. Dow, is not entitled to the compensation and damages to be paid for the taking of said Parcel No. 1, and that the same rightfully belongs to and should be paid to the persons or concerns, who, as heirs or devisees of James Bute, deceased, and John F. Garrott, deceased, were the owners of the land in said Parcel on March 9, 1943, the date on which the United States of America took possession of said parcel.

9. That the said deed of conveyance to C. M. Dow, above mentioned, was executed by Bertha B. Day, Dorothy Elizabeth Franklin, Agnes B. Nickel, Don C. Nickel, James Bute III, John Bute, Mary Elizabeth Nemeth, Theodore J. Nemeth, Lois Bute Porter, Randon Porter, Jr., Guardian Trust Company, Executor and Trustee under the will of Alevia Bute Hill, deceased, and Houston Bank and Trust Company, Independent Executor and Trustee under the will of John F. Garrott, deceased; that so far as petitioner knows and believes the said above-named persons and concerns were the owners of said Parcel No. 1 at the time the same was taken by the United States of America, subject to certain easement rights existing in favor of Houston Lighting and Power Company, Gulf Refining Company and Sinclair Refining Company; that the said above-named landowners should be made parties to this proceeding in order that they may present and assert their claims to the compensation and damages to be awarded for the taking of said Parcel No. 1, but the three easement owners, who are defendants herein, have no interest in the matters alleged in this motion, as each of them have executed stipu-

lations waiving any claim to the compensation to be paid for said parcel.

35 Wherefore, petitioner prays the Court for an order setting aside the Award of the Commissioners filed herein on November 16, 1948, and directing the Commissioner to have a re-hearing as to said Parcel No. 1 after due notice of the same has been served upon the landowners hereinabove named and upon C. M. Dow, defendant herein, to the end that the controversy of title, if any, between the said C. M. Dow and the other parties above named may be determined and settled by the Court. In this connection Petitioner alleges that it cannot safely pay out compensation for the taking of Parcel No. 1 until it has been judicially determined to whom the same should be paid.

UNITED STATES OF AMERICA

By SCOTT W. KEY,
Scott W. Key
Special Assistant to the
United States Attorney

* * *

NOTICE AND CERTIFICATE OF SERVICE

I, Scott W. Key, Special Assistant to the United States District Attorney, do hereby certify that on the 6th day of October, 1949, I mailed a copy of the above and foregoing motion, together with copies of the exhibits attached to the same, and a copy of this notice to E. A. Kelley, Attorney for the defendant, C. M. Dow, and Notice is hereby given that Petitioner moves the submission of said Motion to Court on Monday, October 24th, 1949.

SCOTT W. KEY
Attorney for Petitioner

36 **Exhibit "A" to Motion**

In The

DISTRICT COURT OF THE UNITED STATES

For the Southern District of Texas

Houston Division

* * *

United States of America, :
Petitioner :

v. :

15.8753 Acres of Land, More or Less, in Harris County, Texas and James Bute, et al., : Civil Action No. 955
Defendants :

* * *

ORDER OF POSSESSION

This day came on before me to be heard the application of the United States of America for the immediate use, occupancy and possession of certain lands hereinafter described, and as described in the petition in condemnation herein filed, for the construction, operation, maintenance, patrol, repair and replacement of a pipe line or pipe lines for the transportation of petroleum products, or any other material or substance that can be transported through a pipe line, and it appearing to me that the United States of America is authorized to acquire the interests in said lands, and that the United States of America is authorized in advance of the conclusion of the condemnation proceedings which have been instituted herein to have

37 the immediate use, occupancy and possession of said lands, and it further appearing to me that under the act of Congress approved March 27, 1942, (Public Law No. 507, 77th Congress), provision has been made for the payment of certain just and adequate compensation to the parties entitled thereto as a result of this condemnation suit, and it further appearing to the Court that the Administrator of the Federal Works Agency has certified officially that adequate appropriation for the payment of said just compensation to the parties entitled thereto has

been made; and it further appearing to the Court that the petitioner herein is seeking to condemn perpetual right-of-way in said tracts as hereinafter fully set out;

NOW, THEREFORE, on this 9 day of March, 1943, it is hereby ORDERED and DIRECTED that leave be and is hereby granted the United States of America to take immediate possession of said land, to wit:

PARCEL NO. 1

Being a tract of land containing 2.7139 acres more or less, having a width of 33′ and a total center line length of 3582.3′ and being out of that certain 616 acres of land more or less in the John R. Harris survey, Abstract 27, Harris County, Texas, and being the same land conveyed to James Bute and John F. Garrott by deeds recorded in Volume 240, pages 376, 377, and 378, deed records, Harris County, Texas, said 2.7139 acre tract more fully described as follows:

Beginning at a point in the west line of said 616 acres, said point being the northeast corner of Broadview Addition, a sub-division of 256.77 acres of land in the southwest corner of the John R. Harris survey recorded in Volume 7, page 24, of the map records of Harris County, Texas, said northeast corner being
38 also the southwest corner of the Abbie Dell Drouet Meroney 19.5 acre tract recorded in Volume 855, page 728, deed records, Harris County, Texas;

Thence north 0° 30 min. east along said west line 40.2′ to a point for the southwest corner and place of beginning of the 2.7139 acre tract herein described;

Thence south 76° 05 min. east 3582.2′ to a point in the east line of said 616 acres, said east line being also the west line of the Meadowbrook Development Company land;

Thence north 0° 55 min. east along said east line 33.9′ to a point distant south 0° 55 min. west 3228.1′ from a 1″ iron pipe set in the southwest right-of-way line of the old Galveston-Harrisburg electric railroad, marking a north corner of the Meadowbrook Develop-

ment Company's land and a northeast corner of the 616 acre tract above mentioned;

Thence north 76° 05 min. 3581.1';

Thence north 83° 0 min. west 1.3', to a point in the west line of said 616 acres;

Thence south 0° 30 min. west 33.8' to the point of beginning.

* * * * * * * * *

(Metes and bounds descriptions of Parcels Nos. 2, 3, 4, 5, 6, 7-A and 7-B, are omitted from this copy)

* * * * * * * * *

to the extent of the interest to be acquired by the United States of America and to proceed with such public works thereon as have been authorized by Congress.

It is further ORDERED that the Clerk of this Court send by registered mail a certified copy of this order to the alleged owners of the above described property and to any other persons in actual possession of said
39 property, whose addresses are known to the petitioner, such addresses to be forthwith furnished to said Clerk by said petitioner, but the mailing of such notice shall not in any wise affect the right herein granted to the petitioner to immediate possession of said premises. The Court specifically reserves the right to order such other and further notice to be given of this matter as may be deemed appropriate at any later date.

/s/ T. M. KENNERLY
United States District Judge

Done at Houston, Texas,
this 9 day of March,
A.D. 1943

Exhibit "B" to Motion

STATE OF TEXAS }
COUNTY OF HARRIS }

BEFORE ME, the undersigned authority, on this day personally appeared M. W. Lee, who, being by me duly swern, on his oath deposes and says:

That during the year 1943 he was familiar with the use and occupancy of Parcel No. 1 in Civil No. 955 pending on the docket of the United States District Court at Houston, Texas; that the said parcel was a right-of-way strip for an oil and gas pipe line across a large tract of land near Houston, Texas, belonging to the Heirs of James Bute, deceased, and the Heirs of John T. Garrott, deceased; that he has been informed that an order of possession was entered in the above-numbered condemnation proceeding by the United States District Judge on March 9, 1943; that within ten days after the entry of such order of possession, the United States of America or the pipeline contractor acting for the United States of America, commenced laying a pipeline over and across said Parcel No. 1; that the laying of said pipeline in and along said parcel was completed some time during the year 1943, and thereafter and in 1943, oil was flowing through said line and it has been constantly used since said time for the transportation of oil or gas; that affiant is acquainted with the above and foregoing facts because at said time he was employed by the Reconstruction Finance Corporation to inspect and appraise properties along the right-of-ways of the several tracts embraced in said condemnation proceeding, and on that account he had occasion to inspect and observe said lands many times during the year 1943.

M. W. LEE
M. W. Lee

Subscribed and sworn to before me on this the 6th day of October, 1949.

CAROLINE L. GRAHAM
Caroline L. Graham
Notary Public in and for
Harris County, Texas

Exhibit "C" to Motion

THE STATE OF TEXAS)
COUNTY OF HARRIS)

KNOW ALL MEN BY THESE PRESENTS: That we, Houston Bank & Trust Company (formerly Houston
41 Land & Trust Company) a corporation of Houston, Harris County, Texas, as Independent Executor and Trustee under the will and of the Estate of John F. Garrott, deceased; Bertha B. Dav, a feme sole, of McHenry County, Illinois; Dorothy Elizabeth Franklin, a feme sole, of Harris County, Texas; Agnes B. Nickle Joined pro forma by my husband, Donald C. Nickle, of Toronto, Canada; Guardian Trust Company, a corporation of Houston, Harris County, Texas, as Executor and Trustee under the will and of the Estate of Alevia Bute Hill, deceased; James Bute, III, of Harris County, Texas; Mary Elizabeth Nemeth joined pro forma by my husband; Theodore J. Nemeth, of New York City, New York; John Bute of Harris County, Texas; and Lois Bute Porter, joined pro forma by my husband, Randon Porter, Jr., the said Randon Porter, Jr., acting herein by and through his duly authorized agent and attorney in fact, Lois Bute Porter, of Harris County, Texas, all jointly hereinafter referred to as "Grantors", for and in consideration of the sum of Two Hundred and One Thousand One Hundred Eighteen & 77/100 Dollars (201,118.77) cash to us in hand paid by C. M. Dow, the receipt and sufficiency whereof is hereby acknowledged by Grantors; have Granted, Bargained, Sold, and Conveyed, and by these presents do Grant, Bargain, Sell, and Convey, unto the said C. M. Dow, of Houston, Harris County, Texas, and herein at times referred to as "Grantee", the following described real estate and property situated in and being a portion of the Jno. R. Harris Survey in the County of Harris and State of Texas, to wit:

FIRST TRACT: 617.289 acres of land situated in the Jno. R. Harris Survey, Abstract No. 27, and being a portion of lands now or formerly owned by J. F. Garrott
42 Estate and James Bute Estate, more particularly described as follows:

BEGINNING at a point in the most northerly northeast corner of a tract of land now or formerly of E. N.

Drouet and the most westerly northwest corner of a 400.0 acre, more or less, tract formerly known as the Mrs. R. J. Allen Tract; said point being a point in the center line of the old channel of Sims Bayou;

Running THENCE South, along an eastern line of said E. N. Drouet Tract, at 15.0 feet pass a 3/4 inch iron pipe on the southern bank of the said old channel of Sims Bayou; in all 105.0 feet to a re-entrant corner of said E. N. Drouet Tract, and a southwesterly corner of the said Mrs. R. J. Allen 400.0, more or less acre tract;

THENCE East, along northerly line of said E. N. Drouet Tract and a southerly line of said Mrs. R. J. Allen 400.0, more or less, acre tract, at 296.0 feet pass a northeasterly fence corner; in all 445.0 feet to a 3/4 inch iron pipe set in the roots of the two 10-inch elms growing together on the west bank of a gully; said pipe marking the most easterly northeast corner of the said E. N. Drouet Tract and re-entrant corner to the said Mrs. R. J. Allen 400.0, more or less, acre tract;

THENCE S. 00 deg. 05 min. E., along the westerly line of the said Mrs. R. J. Allen 400.00, more or less, acre tract, at 165.4 feet pass a northeasterly fence corner and continuing from

THENCE, along an old fence and at 2889.4 feet across the center line of the Houston Lighting & Power Company's Highline, at 5122.4 feet pass the southwesterly corner of the said Mrs. R. J. Allen 400.0, more or less,
43 acre tract, and the northwesterly corner of a 112.0, more or less, acre tract in the name of Mrs. J. Stubbs; in all 6531.4 feet to a 3/4 inch pipe set in dividing line between the Jno. R. Harris Survey and the D.W.C. Harris Survey, as fenced; said point marking the southwesterly corner of the said Mrs. J. Stubbs 112.0, more or less, acre tract;

THENCE East, along said dividing line of the Jno. R. Harris and the D.W.C. Harris Surveys, as fenced, and along the southerly line of said Mrs. J. Stubbs 112.0, more or less, acre tract, and the northerly line of the Municipal Airport, as fenced and generally recognized, 3484.2 feet to a 3/4 inch pipe marking the southeasterly corner of the said Mrs. J. Stubbs Tract and the southwesterly corner of

a tract of land subdivided and known as Meadowbrook acres, as fenced;

THENCE N. 00 deg. 10 min. E. Along the easterly line of the said Mrs. J. Stubbs 112.0, more or less, acre tract and the westerly line of said Meadowbrook Acres, at 1409.0 feet pass the northeasterly corner of the said Mrs. J. Stubbs 112.0, more or less, acre tract, and the southeasterly corner of a 117.0, more or less, acre tract, formerly in the name of C. D. Allen, and continuing

THENCE, along the easterly line of said C. D. Allen 117.0 more or less, acre tract, and the westerly line of said Meadowbrook Acres Subdivision, as fenced and generally recognized, at 4227.0 feet cross the center line of the said Houston Lighting & Power Company's Highline; in all 7451.0 feet to the northwesterly corner of said Meadowbrook Acres Subdivision as marked by a 3/4 inch pipe set in the southwesterly line of a right-of-way of the Galveston-Houston Interurban Railroad Company, as fenced and now abandoned;

44 THENCE N. 41 deg. 23 min. W., along the southwesterly line of said abandoned right of way, at 674.5 feet pass a 3/4 inch pipe; in all 802.5 feet to the center line of the old channel of Sims Bayou;

THENCE, following the center line of the old channel of Sims Bayou as it existed prior to the changing of its course by the Harris County Drainage District, and running in a westerly direction and with all of its meanderings to the place of beginning; containing, as aforesaid, 617.289 acres of land; as surveyed in October, 1945, by A. C. Stimson, C. E., County Surveyor of Harris County, Texas;

TO HAVE AND TO HOLD the above described property and premises, together with all and singular the rights and appurtenances thereto in anywise belonging, unto the said C. M. Dow, his heirs and assigns, forever; and the Grantors do hereby bind themselves, their heirs, successors, executors and administrators in the proportions and subject to the limitations hereinafter set forth, to warrant and forever defend all and singular said property and premises unto the Grantee, his heirs and assigns, against every person whomsoever lawfully claiming, or to claim the same, or any part thereof; save and except that no warranty,

either express or implied, is given by Grantors on or covering the aforesaid Tract 2, being the former right-of-way of Galveston-Houston Electric Railway Company; and also except as to the right-of-way easements and condemnation proceedings hereinafter mentioned; and also conditioned that the warranty of Houston Bank & Trust Company as Executor and Trustee of the Estate of John F. Garrott, deceased, and of Guardian Trust Company as Executor and Trustee of the Estate of Alevia Bute
45 Hill, deceased, shall be binding on such estates only to the extent that such estates may be legally bound. The title to the above property and premises is presently vested in Grantors in the following proportions, to wit:

Houston Bank & Trust Company, Independent Executor and Trustee under the Will of John F. Garrott, deceased, 1/2 thereof; Bertha B. Day 1/8 thereof; Dorothy Elizabeth Franklin 1/8 thereof; Agnes B. Nickle 1/16 thereof; Guardian Trust Company Executor and Trustee under the Will of Alevia Bute Hill, deceased 1/16 thereof; James Bute III 1/32 thereof; Mary Elizabeth Nemeth 1/32 thereof; John Bute 1/32 thereof; Lois Bute Porter 1/32 thereof; and as a part of the consideration hereof, it is understood and agreed that the liability, if any, of the Grantors herein on any warranty hereunder, shall be several and not joint, and no Grantor shall ever be held on such warranty, should the title to such property fail, except for the proportionate interest of such Grantor in and to said property as hereinabove set forth. It is expressly agreed that this deed is executed by Grantors and accepted by Grantee, as being subject to the existence of the following easements and proceedings:

(a) That certain pipe line right-of-way easement dated November 4, 1920, recorded in Vol. 462, page 406 of the Harris County Deed Records from John Bute and R. A. Welch Trustees of the Estate of James Bute and John F. Garrott and John Bute to S. M. Briscoe:

(b) That certain pipe line right-of-way easement dated October 30, 1920, recorded in Vol. 465, page 9 of the Harris County Deed Records, from John Bute and R. A. Welch, Trustees, of the Estate of James Bute, deceased,
46 and John F. Garrott and John Bute to Gulf Pipe Line Company;

(c) An unrecorded easement for power line given to Houston Light & Power Company to cross the aforesaid property;

(d) Condemnation proceedings filed by the United States of America vs. James Bute *el* al, Civil Action No. 955 in District Court of the United States, all as reflected in Lis Pendens Notice recorded in Vol. 7, page 218, Lis Pendens Records of Harris County, Texas. Taxes against the aforesaid property for the current year of 1945 have been prorated and adjusted between the parties hereto, and under such adjustment such taxes are to be paid by and are assumed by the Grantee.

EXECUTED as of the 1st day of November, A. D. 1945.

Houston Bank & Trust Company, in its capacity as Independent Executor and Trustee under the will and the Estate of John F. Garrott, deceased, and not individually, By O. R. Weyrich, President.

ATTEST: G. A. Holder, Cashier, [Seal]

Bertha B. Day
Dorothy Elizabeth Franklin
Agnes B. Nickle
Donald C. Nickle - pro forma
James Bute III
John Bute
Mary Elizabeth Nemeth

47

Theodore J. Nemeth - pro forma
Lois Bute Porter
Randon Porter, Jr.,
By Lois Bute Porter His Agent
and Atty-in-fact Guardian Trust Co.,
in its capacity as Executor and
Trustee under the will and of the
Estate of Alevia Bute Hill, deceased,
and not individually, By J. S. Whitworth, Vice-Pres.

ATTEST: Norman Sterling, Asst. Secretary [Seal]

COPY

Filed 11-16-48

Exhibit "D" to Motion

Houston, Texas
November 8th, 1948

Hon. Brian S. Odem
U. S. District Attorney
Houston, Texas

Attention: Mr. Scott W. Key
Land Department

Re: Civil Action No. 955
Milby Dow Tract
618 Acres. 2.7139 Acres.
Parcel No. 1

Dear Sir:

The undersigned Commissioners having inspected the land involved in the above captioned case, following the Commissioners Court Hearing on November 2nd, 48 1948, respectfully submit the following award to the land owner, to wit:

FOUR THOUSAND FOUR HUNDRED & FIFTY Dollars

($4,450.00)

As compensation for land taken, including all damages.

Respectfully,

D. BARKER
D. Barker

THOS. H. GUTHRIE
Thos. H. Guthrie

A. D. FOREMAN
A. D. Foreman
U. S. Commissioners

Exhibit "E" to Motion

STATE OF TEXAS)
COUNTY OF HARRIS)

BEFORE ME, the undersigned authority, on this day personally appeared Scott W. Key, who, being by me duly sworn, on his oath deposes and says:

That since May 1, 1944, he has been serving as Special Assistant to the United States Attorney for the Southern District of Texas in the Houston Office; that his duties have been entirely connected with the Lands Division of said office, which division has charge of all condemnation proceedings; that after the resignation of H. L. Lewis as Assistant United States Attorney in 1947, affiant took charge of Civil No. 955; that on November 2, 1948, a hearing was had before the Special Commissioners for the purpose of determining the compensation and damages due by the United States for the taking of Parcel No. 1 in said proceeding; that only C. M. Dow, as owner of said land, was made a party to said proceeding as affiant had been informed that the said C. M. Dow purchased said land and affiant was under the impression that he is entitled to the compensation due for the taking of the same; that since said hearing affiant has made a more careful study of the title to said land and has learned that said C. M. Dow did not acquire the same until two years after the same had been taken by the United States of America and on that account the affiant is now of the opinion that the owners of said land at the time of the taking of the same are entitled to the compensation and should have been made parties to the said proceeding; that affiant knows of his own knowledge that the allegations set out in Paragraphs 7 and 8 are correct inasmuch as he took charge of said condemnation proceeding during the year 1947.

49

SCOTT W. KEY
Scott W. Key

Subscribed and sworn to before me on this the 6th day of October, 1949.

CAROLINE L. GRAHAM
Caroline L. Graham
Notary Public in and for
Harris County, Texas

50 IN UNITED STATES DISTRICT COURT

Entry Made by Judge Kennerly on Motion Calendar—Filed, Nov. 1, 1949.

"11-1-49: By agreement of counsel, the Motion of the Government for an Order setting aside Commissioners' Award and directing a Rehearing before the Commissioners is dropped from the Motion Calendar, without prejudice to the Government's right to bring same on for hearing on the Motion Calendar at a later date. Clerk will notify counsel.

T. M. K."

IN UNITED STATES DISTRICT COURT

Motion for Summary Judgment Dismissing the Claim of C. M. Dow—Filed, May 6, 1955

To The Honorable Judge of Said Court:

NOW COMES Petitioner, UNITED STATES OF AMERICA, and respectfully shows to the Court as follows:

I.

That this proceeding was commenced on the 9th day of March, 1943, by the filing of a Petition to condemn a right-of-way easement 33 feet in width over and across a tract of land in Harris County, Texas, out of the John R. Harris Survey, containing 617.289 acres of land; that the right-of-way easement sought to be condemned across said 617.289 acres contains 2.7139 acres of land and
51 is designated in the proceeding as Parcel No. 1, and that on said 9th day of March, 1943 this Court entered an Order granting Petitioner the immediate possession of the land in said Parcel No. 1.

That the matters hereinabove alleged are apparent from instruments on file in this cause, and said record is here now referred to in substantiation of said allegations.

II.

That, pursuant to the Order of the Court hereinabove mentioned, Petitioner, within ten days after said Order,

entered upon, took possession of and laid a pipe line over and across the land herein designated as Parcel No. 1.

The facts alleged in this paragraph are substantiated by Affidavit of one M. L. Lee, attached to a Motion filed herein by Petitioner on October 6, 1949, praying for an Order setting aside the Commissioners' award, which Affidavit is here referred to and made a part hereof.

III.

On November 2, 1948, the Commissioners appointed by this Court held a hearing for the purpose of determining the compensation and damages due by the United States of America for the taking of said Parcel No. 1, and on November 16, 1948, said Commissioners filed in this Court their written report, awarding the sum of Four Thousand, Four Hundred Fifty Dollars ($4,450.00) as compensation for the taking of said Parcel No. 1, copy of which report is attached to the Motion filed by Petitioner on October 6, 1949, which copy of said report is here referred to and made a part hereof.

The facts set out in this paragraph are matters of record in this cause, and such record is referred to in the substantiation thereof.

52

IV.

That the Defendant, C. M. Dow, pursuant to Notice served on him and his attorney, appeared at said Commissioners' hearing and offered evidence as to the value of said Parcel No. 1; that no other person or their attorneys appeared at such hearing and that no other persons or concerns were served with notice of such hearing; and the Attorney representing the United States of America at such hearing was then under the impression that there were no parties other than the said C. M. Dow who were entitled to the compensation and damages for the taking of said Parcel No. 1.

That the facts hereinabove alleged are verified by the Affidavit of Scott W. Key, an Assistant to the United States Attorney, which Affidavit it attached to the above mentioned Motion filed by the United States of America

on October 6, 1949, and is here referred to and made a part hereof.

V.

That on November 18, 1948, the United States of America duly filed its objections to the award of the Commissioners, copy of which objections is hereto attached, marked Exhibit 1, and made a part hereof.

VI.

That thereafter, the Motion filed by Petitioner on October 6, 1949, for an Order setting aside the award of the Commissioners, came on for hearing before the Honorable T. M. Kennerly, United States District Judge, but said Judge at the request of the Attorney for C. M. Dow, made no ruling thereon and stated that said Motion
53 would be carried in suspense on the Motion Docket to be acted on in the future.

The facts alleged in this paragraph are verified by the Affidavit of Scott W. Key hereto attached, marked Exhibit 2, and made a part hereof.

VII.

That the Defendant, C. M. Dow, did not have or own any right, title or interest in the land embraced in said Parcel No. 1 on March 9, 1943, the date on which Plaintiff acquired possession of said land but; by Deed dated November 1, 1945, there was conveyed to the said C. M. Dow a tract of land containing 617.289 acres in the John R. Harris Survey in Harris County, Texas, said Parcel No. 1 being an easement laid across said larger tract of 617.289 acres; that said land was conveyed to the said C. M. Dow on the above mentioned date by the heirs and devisees of J. F. Garrett and James Bute, deceased, and a copy of such conveyance is attached to the Motion filed herein by Petitioner on November 6, 1949, and the same is here referred to and made a part hereof.

Petitioner respectfully alleges that by reason of the facts hereinabove alleged, the Defendant, C. M. Dow, had no right, title or interest in Parcel No. 1 on March 9, 1943,

the date on which Petitioner took possession of said land; and, therefore, said C. M. Dow is not entitled to any compensation or damages for the taking of said Parcel No. 1 and is not a necessary party to this proceeding.

WHEREFORE, Petitioner moves the Court for the entry of a Summary Judgment, dismissing the said C. M. Dow as a Party Defendant in this cause. In connection
54 therewith, the Petitioner further moves for the resubmission of its Motion filed herein on October 6, 1949, praying for an Order, setting aside the award of the Commissioners.

Respectfully submitted,

UNITED STATES OF AMERICA

By SCOTT W. KEY
Assistant United States
Attorney

NOTICE

NOTICE is hereby given that Petitioner, United States of America, moves the submission of the above and foregoing Motion to the Court on Monday, May 23, 1955.

It is hereby certified that a copy of the above and foregoing Motion and of this Notice was mailed to John H. Crooker, Jr., Attorney of Record for the Defendant, C. M. Dow, on this the 10th day of May, 1955.

SCOTT W. KEY
Assistant United States Attorney

A TRUE COPY I CERTIFY

ATTEST: V. BAILEY THOMAS, CLERK

ADDENDA

By: Lois Wiech, Deputy

FILED: the 6th day of May, 1955.

Petitioner does not deem it necessary to file a brief in support of this Motion, but in support of the same, does

hereby adopt the brief filed by Petitioner on October 6, 1949, in support of Petitioner's Motion filed on said date.

SCOTT W. KEY
Assistant United States Attorney
Filed 11-16-48

55 **Exhibit "1" to Motion**

Houston, Texas
November 8th, 1948

Hon. Brian S. Odem
U. S. District Attorney
Houston, Texas

Attention Mr. Scott W. Key
Land Department
Re: Civil Action No. 955
Milby Dow Tract
618 Acres. 2.7139 Acres.
Parcel No. 1

Dear Sir:

The undersigned Commissioners having inspected the land involved in the above captioned case, following the Commissioners Court Hearing on November 2nd, 1948, respectfully submit the following award to the land owner, to wit:

FOUR THOUSAND FOUR HUNDRED & FIFTY
Dollars ($4,450.00)

As compensation for land taken, including all damages.

Respectfully,

D. BARKER
D. Barker

THOS. H. GUTHRIE
Thos. H. Guthrie

A. D. FOREMAN
A. D. Foreman
U. S. Commissioners

56 **Exhibit "2" to Motion**

FILED:

STATE OF TEXAS)
COUNTY OF HARRIS)

BEFORE ME, the undersigned authority, on this day personally appeared SCOTT W. KEY, who, being by me duly sworn, on his oath deposes and says:

That Affiant, as Assistant United States Attorney, prepared a Motion in Civil Action No. 955, praying for an Order setting aside the award of the Commissioners made in said proceeding as to Tract No. 1; that said Motion was filed on October 6, 1949, and thereafter came on for hearing before the Honorable T. M. Kennerly, United States District Judge; that the Defendant, C. M. Dow, by his attorney appeared at such hearing without filing any opposition to said Motion and requested the Court to withhold ruling on the same in order that he might secure the intervention of the other parties in the proceedings; that the said Judge granted such request and made no ruling on the Motion but stated that the same would be carried in suspense on the Motion Docket subject to be re-submitted sometime in the future.

SCOTT W. KEY

SUBSCRIBED AND SWORN TO by SCOTT W. KEY, before me the undersigned authority on this the 6th day of May, 1955.

/s/ CAROLINE L. GRAHAM
Notary Public in and for Harris County, Texas
Caroline L. Graham

(Seal)

57 IN UNITED STATES DISTRICT COURT

Motion of Houston Bank & Trust Company, Trustee, et al., to Withdrawal Waiver and to Claim Proceeds of Condemnation Award—Filed, March 5, 1956

NOW COME, Houston Bank & Trust Company, Independent Executor and Trustee under the will of John F. Garrott, deceased, Mrs. Bertha B. Day, a feme sole, Mrs. Dorothy Elizabeth Franklin, a feme sole, Mrs. Agnes B.

Nickle and husband, Donald C. Nickle, Bank of the Southwest National Association (Formerly The Second National Bank of Houston, successor to Guardian Trust Company) Executor and Trustee under the will of Alevia Bute Hill, deceased, James Bute III, Mrs. Mary Elizabeth Nemeth and husband, Theodore J. Nemeth, John Bute, and Mrs. Lois Bute Porter and husband, Randon Porter, Jr., said parties being defendants herein and having been served with notice of condemnation herein, and respectfully show the Court:

THAT heretofore on June 24, 1955 they filed in this cause and appearance for all purposes and designated the property in which they are interested to be as follows:

PARCEL I

Being a tract of land containing 2.7139 acres more or less, having a width of 33′ and a total center line
58 length of 3582.3′ and being out of that certain 616 acres of land more or less, in the John R. Harris Survey, Abstract 27, Harris County, Texas, and being the same land conveyed to James Bute and John F. Garrott by deeds recorded in Volume 240, pages 376, 377 and 378 Deed Records, Harris County, Texas, said 2.7139 acre tract more fully described as follows:

"Beginning at a point in the west line of said 616 acres, said point being the northeast corner of Broadview Addition, a subdivision of 256.77 acres of land in the southwest corner of the John R. Harris Survey, recorded in Volume 7, page 24, of the Map Records of Harris County, Texas, said northeast corner being also the southwest corner of the Abbie Dell Drouet Meroney 19.5 acre tract recorded in Volume 855, page 728, deed records, Harris County, Texas;

"Thence north 0 degrees 30 min. east along said west line 40.2′ to a point for the southwest corner and place of beginning of the 2.7139 acre tract herein described;

"Thence south 76 degrees 05 min. east 3582.2′ to a point in the east line of said 616 acres, said east line

being also the west line of the Meadowbrook Development Company land; 60

"Thence north 0 degrees 55 min, east along said east line 33.9′ to a point distant south 0 degrees 55 min. west 3228.1′ from a 1″ iron pipe set in the southwest right-of-way line of the old Galveston-Harrisburg electric railroad, marking a north corner of the Meadowbrook Development Company's land and a northeast corner of the 616 acre tract above mentioned;

59 Thence north 76 degrees 05 min. west 3581.1′;

"Thence north 83 degrees 0 min. west 1.3′ to a point in the west line of said 616 acres;

"Thence south 0 degrees 30 min. west 33.8′ to the point of beginning."

IN said notice of appearance these Defendants alleged that by deed dated November 1, 1955 they conveyed to C. M. Dow 617.289 acres of land, more or less, in the John R. Harris Survey, Abstract No. 27, in Harris County, Texas, and being the tract of land out of which the above described Parcel No. 1 has been taken, and in said appearance these Defendants further suggested and requested that the award to be made for the taking by condemnation of the said Parcel No. 1 be paid to the Defendant, C. M. Dow.

THESE Defendants now desire to withdraw said request and motion for the payment of such condemnation award to C. M. Dow and ask leave of the Court to withdraw such notice of appearance and waiver of their claim for compensation herein and now assert their right to an interest in the compensation to be awarded in connection with such condemnation.

WHEREFORE, these Defendants move the Court for leave to withdraw their notice of appearance and waiver of right to compensation herein filed by them in this cause on June 24, 1955 and that the compensation to be paid by the United States of America for the taking of said

Parcel No. 1 be paid to them as owners of the land at the time of taking on the 9th day of March, 1943.

Respectfully submitted

FRANKLIN, KELLY & GRAHAM

By /s/ EDWARD A. KELLY
Edward A. Kelly

Attorneys for Defendants, Houston Bank & Trust Company, Independent Executor and Trustee under the will of John F. Garrott, deceased, Mrs. Bertha B. Day, a feme sole, Mrs. Dorothy Elizabeth Franklin, a feme sole, Mrs. Agnes B. Nickle and husband, Donald C. Nickle, Bank of the Southwest National Association (formerly The Second National Bank of Houston, successor to Guardian Trust Company) Executor and Trustee under the will of Alevia Bute Hill, deceased, James Bute III, Mrs. Mary Elizabeth Nemeth and husband, Theodore J. Nemeth, John Bute, and Mrs. Lois Bute Porter and husband, Randon Porter, Jr.

61 CERTIFICATE OF SERVICE

I, E. A. KELLY, certify that copies of the foregoing motion have been served by me by mailing such copies by United States mail this 5th day of March, 1956 as follows:

To - Mr. Scott W. Key, Assistant United States Attorney for the United States of America,
Postoffice Building,
Houston 2, Texas

To - Mr. L. Keith Simmer,
c/o Fulbright, Crooker, Freeman, Bates & Jaworski,
Attorneys for C. M. Dow
South Coast Life Building
Houston, Texas

To - Mr. Edgar E. Townes, Jr.
c/o Townes & Townes
Attorneys for Memorial Hospital
477 San Jacinto Building
Houston 2, Texas

/s/ E. A. KELLY
E. A. Kelly

IN UNITED STATES DISTRICT COURT

Summary Judgment Dismissing C. M. Dow as a Party Defendant—Filed, March 29, 1956

On this the————day of————, 1956, there came on for consideration the motion filed herein by plain-
62 tiff, United States of America, praying for a summary judgment dismissing C. M. Dow as a party defendant in this cause. Upon consideration of said motion the Court is of the opinion that said motion for summary judgment is good and should be granted.

In this connection, from a consideration of the pleadings of all parties and the affidavits submitted in support of said motion, the Court finds the following facts to be without dispute:

1. This action was commenced on March 9, 1943, by the United States of America against James Bute, et al, for the purpose of condemning pipe line right-of-way easements across certain tracts of land in Harris County, Texas; that Parcel No. 1 in said condemnation is an easement 33 feet in width and 3582.03 feet in length, being a total of 2.7139 acres, over and across a tract of 617.289 acres of land situated in the Jno. R. Harris Survey, Abstract No. 27, in Harris County, Texas; on March 9, 1943, said 617.289 acres of land belonged to the Estate and heirs of John F. Garrott, deceased, and the Estate and heirs of James Bute, deceased.

2. Before service of citation and before return date, and on March 9, 1943, an ex parte order of the District Court was entered providing in part as follows as to said Parcel No. 1:

> "It is hereby ordered and directed that leave be, and it is hereby granted the United States of America to take immediate possession of said land * * * to the extent of the interest to be acquired by the United States of America."

63 Within ten (10) days after the entry of such order of possession, the United States of America, or the pipe line contractor acting for the United States of America, commenced laying a pipe line over and across said Parcel No. 1. That said pipe line was completed and has been constantly used since said time for the transportation of oil or gas.

3. On November 1, 1945, a deed to 617.289 acres of land situated in the Jno. R. Harris Survey, Abstract No. 27, Harris County, Texas, said deed being executed by Houston Bank & Trust Company, in its capacity as Independent Executor and Trustee under the Will and the Estate of John F. Garrott, Deceased, Bertha B. Day, Dorothy Elizabeth Franklin, Agnes B. Nickle, joined by her husband, Donald C. Nickle, James Bute III, John Bute, Mary Elizabeth Nemeth, joined by her husband, Theodore J. Nemeth, Lois Bute Porter and Randon Porter, Jr., by Lois Bute Porter, his agent and attorney-in-fact; Guardian Trust Company (thereafter succeeded by Second National

Bank of Houston), in its capacity as Executor and Trustee under the Will and of the Estate of Alevia Bute Hill, Deceased, was delivered to defendant C. M. Dow. The individual signers were all of the heirs of James Bute, deceased. Houston Bank & Trust Company, as Independent Executor of the Estate and Trustee under the will of John F. Garrott, Deceased, had full power and authority to sell and convey said land. Guardian Trust Company, in its capacity as Executor and Trustee under the Will and of the Estate of Alevia Bute Hill, Deceased, had full power and authority to sell and convey said land.

4. The deed to defendant, C. M. Dow, dated November 1, 1945, covered the full 617.289 acres of land and provided:

64 "It is expressly agreed that this deed is executed by Grantors and accepted by Grantee is being subject to the existence of the following easements and proceedings:

* * * (d) Condemnation proceedings filed by the United States of America v. James Bute, et al, Civil Action No. 955 in the District Court of the United States, all as reflected in Lis Pendens Notice recorded in Vol. 7, page 218, Lis Pendens Records of Harris County, Texas. * * *"

A copy of such deed is hereto attached and marked Exhibit "A".

5. On May 31, 1946, the United States of America filed its declaration of taking of the lands involved in this proceeding, including the said Parcel No. 1, and deposited the sum of $1151.30 in the Registry of the Court as the estimated compensation for the taking of said Parcel No. 1.

6. On November 2, 1948, Commissioners appointed by the Court held a hearing for the purpose of determining the compensation and damages due from the United States of America for the taking of said Parcel No. 1, at which hearing defendant, C. M. Dow, appeared and offered evidence as to the value of said Parcel No. 1. On November 16, 1948, such Commissioners filed their report awarding the sum of Four Thousand Four Hundred Fifty Dollars

($4,450.00) as compensation for the taking of Parcel No. 1, labeled by said Commissioners "Milby Dow Tract".

7. Houston Bank & Trust Company, Independent Executor and Trustee under the Will of John F. Garrott, Deceased, Mrs. Bertha B. Day, a feme sole, Mrs. Dorothy Elizabeth Franklin, a feme sole, Mrs. Agnes B. Nickle and husband, Donald C. Nickle, The Second National
65 Bank of Houston, successor to Guardian Trust Company, Executor and Trustee under the Will of Alevia Bute Hill, Deceased, James Bute III, Mrs. Mary Elizabeth Nemeth and husband, Theodore J. Nemeth, John Bute and Mrs. Lois Bute Porter and husband, Randon Porter, Jr., appeared in this proceeding and made known to the Court that their conveyance of November 1, 1945, to C. M. Dow was intended by them to include all their right, title and interest in the said Parcel No. 1 or in the award to be made for same.

CONCLUSIONS OF LAW

1. The Court expressly determines that there is no just reason for delay in rendering final judgment as to the claim of defendant, C. M. Dow, to Parcel No. 1 in this proceeding and, accordingly, the Court expressly directs the entry of final judgment dismissing C. M. Dow. That the above and foregoing determination and direction are made under the provisions of Federal Rule 54(b) and for the express purpose of making this judgment final and appealable, as provided in said Federal Rule.

2. That the deed dated November 1, 1945, to C. M. Dow, is a prohibited assignment of a claim against the United States of America and said deed is ineffective to convey to defendant, C. M. Dow, the compensation due from the United States of America for the taking of said Parcel No. 1.

3. That defendant, C. M. Dow, has no enforceable claim to the said Parcel No. 1 or to the compensation to be awarded in the final judgment in this proceeding and, accordingly, said defendant should be dismissed.

It is, accordingly, ORDERED, ADJUDGED and DECREED by the Court that the said C. M. Dow shall
66 be, and he is hereby, dismissed from this proceeding as a party defendant and his claim to the compensation for the taking of Parcel No. 1 is refused and disallowed.

ORDERED at Houston, Texas, on this the 29th day of March, 1956.

/s/ Ben C. Connally
United States District Judge

APPROVED AS TO FORM:

Fulbright, Crooker, Freeman, Bates & Jaworski
By L. Keith Simmer
L. Keith Simmer
Attorneys for Defendant, C. M. Dow.

Scott W. Key
Scott Key, Assistant U. S. Attorney

Franklin, Kelly & Graham
By Edward A. Kelly
Edward A. Kelly

Attorneys for Houston Bank & Trust Company, Independent Executor and Trustee under the Will of John F. Garrott, Dec'd, Mrs. Bertha B. Day, a feme sole, Mrs. Dorothy Elizabeth Franklin, a feme sole, Mrs. Agnes B. Nickle and husband, Donald C. Nickle, The Second National Bank of Houston, successor to Guardian Trust Company, Executor and Trustee under the Will of Alevia Bute Hill, Dec'd, James Bute III, Mrs. Mary Elizabeth Nemeth and husband, Theodore J. Nemeth, John Bute and Mrs. Lois Bute Porter and husband, Randon Porter, Jr.

Townes & Townes
By Edgar Townes, Jr.
Edgar Townes, Jr.
Attorneys for Defendant, Memorial Hospital.

67 **Exhibit "A" to Summary Judgment**

THE STATE OF TEXAS)
COUNTY OF HARRIS)

KNOW ALL MEN BY THESE PRESENTS: That we, Houston Bank & Trust Company (formerly Houston Land & Trust Company) a corporation of Houston, Harris County, Texas, as Independent Executor and Trustee under the will and of the Estate of John F. Garrott, deceased; Bertha B. Day, a feme sole, of McHenry County, Illinois; Dorothy Elizabeth Franklin, a feme sole, of Harris County, Texas; Agnes B. Nickle, Joined pro forma by my husband, Donald C. Nickle, of Toronto Canada; Guardian Trust Company, a corporation of Houston, Harris County, Texas, as Executor and Trustee under the will and of the Estate of Alevia Bute Hill, deceased; James Bute, III, of Harris County, Texas; Mary Elizabeth Nemeth joined pro forma by my husband, Theodore J. Nemeth, of New York City, New York; John Bute of Harris County, Texas; and Lois Bute Porter, joined pro forma by my husband, Randon Porter, Jr., the said Randon Porter, Jr., acting herein by and through his duly authorized agent and attorney in fact, Lois Bute Porter, of Harris County, Texas, all jointly hereinafter referred to as "Grantors", for and in consideration of the sum of Two Hundred and One Thousand One Hundred Eighteen & 77/100 Dollars ($201,118.77) cash to us in hand paid by C. M. Dow, the receipt and sufficiency whereof is hereby acknowledged by Grantors; have Granted, Bargained, Sold, and Conveyed, and by these presents do Grant, Bargain, Sell, and Convey, unto the said C. M. Dow, of Houston, Harris County, Texas, and herein at times referred to as "Grantee", the following described real estate and property situated in and
68 being a portion of the Jno. R. Harris Survey in the County of Harris and State of Texas, to wit:

FIRST TRACT: 617.289 acres of land situated in the Jno. R. Harris Survey, Abstract No. 27, and being a portion of lands now or formerly owned by J. F. Garrott Estate and James Bute Estate, more particularly described as follows

BEGINNING at a point in the most northerly northeast corner of a tract of land now or formerly of E. N. Drouet and the most westerly northwest corner of a 400.0 acre, more or less, tract formerly known as the Mrs. R. J. Allen Tract; said point being a point in the center line of the old channel of Sims Bayou;

Running THENCE South, along an eastern line of said E. N. Drouet Tract, at 15.0 feet pass a 3/4 inch iron pipe on the southern bank of the said old channel of Sims Bayou; in all 105.0 feet to a re-entrant corner of said E. N. Drouet Tract, and a southwesterly corner of the said Mrs. R. J. Allen 400.0, more or less acre tract;

THENCE East, along northerly line of said E. N. Drouet Tract and a southerly line of said Mrs. R. J. Allen 400.0, more or less, acre tract, at 296.0 feet pass a northeasterly fence corner; in all 445.0 feet to a 3/4 inch iron pipe set in the roots of the two 10-inch elms growing together on the west bank of a gully; said pipe marking the most easterly northeast corner of the said E. N. Drouet Tract and re-entrant corner to the said Mrs. R. J. Allen 400.0, more or less, acre tract.

THENCE S. 00 deg. 05 min. E., along the westerly line of the said Mrs. R. J. Allen 400.0, more or less, acre
69 tract, at 165.4 feet pass a northeasterly fence corner and continuing from

THENCE, along an old fence and at 2889.4 feet across the center line of the Houston Lighting & Power Company's Highline, at 5122.4 feet pass the southwesterly corner of the said Mrs. R. J. Allen 400.0, more or less, acre tract, and the northwesterly corner of a 112.0, more or less, acre tract in the name of Mrs. J. Stubbs; in all 6531.4 feet to a 3/4 inch pipe set in dividing line between the Jno. R. Harris Survey and the D.W.C. Harris Survey, as fenced; said point marking the southwesterly corner of the said Mrs. J. Stubbs 112.0, more or less, acre tract;

THENCE East, along said dividing line of the Jno. R. Harris and the D.W.C. Harris Surveys, as fenced, and along the southerly line of said Mrs. J. Stubbs 112.0, more or less, acre tract, and the northerly line of the Municipal Airport, as fenced and generally recognized, 3484.2 feet

to 3/4 inch pipe marking the southeasterly corner of the said Mrs. J. Stubbs Tract and the southwesterly corner of a tract of land subdivided and known as Meadowbrook acres, as fenced;

THENCE N. 00 deg. 10 min. E. Along the easterly line of the said Mrs. J. Stubbs 112.0, more or less, acre tract and the westerly line of said Meadowbrook Acres, at 1409.0 feet pass the northeasterly corner of the said Mrs. J. Stubbs 112.0, more or less, acre tract, and the southeasterly corner of a 117.0, more or less, acre tract, formerly in the name of C. D. Allen, and continuing

THENCE, along the easterly line of said C. D. Allen 117.0 more or less, acre tract, and the westerly line of said Meadowbrook Acres Subdivision, as fenced and generally recognized, at 4227.0 feet cross the center line of the said Houston Lighting & Power Company's Highline; in all 7451.0 feet to the northwesterly corner of said Meadowbrook Acres Subdivision as marked by a 3/4 inch pipe set in the Southwesterly line of a right-of-way of the Galveston-Houston Interurban Railroad Company, as fenced and now abandoned;

THENCE N. 41 deg. 23 min. W., along the South westerly line of said abandoned right of way, at 674.5 feet pass a 3/4 inch pipe; in all 302.5 feet to the center line of the old channel of Sims Bayou;

THENCE, following the center line of the old channel of Sims Bayou as it existed prior to the changing of its course by the Harris County Drainage District, and running in a westerly direction and with all of its meanderings to the place of beginning; containing, as aforesaid, 617.289 acres of land; as surveyed in October, 1945, by A. C. Stimson, C. E., County Surveyor of Harris County, Texas;

TO HAVE AND TO HOLD the above described property and premises, together with all and singular the rights and appurtenances thereto in anywise belonging, unto the said C. M. Dow, his heirs and assigns, forever; and the Grantors do hereby bind themselves, their heirs, successors, executors and administrators in the proportions and subject to the limitations hereinafter set forth, to

warrant and forever defend all and singular said property and premises unto the Grantee, his heirs and assigns, against every person whomsoever lawfully claiming, or to claim the same, or any part thereof; save and except
71 that no warranty, either express or implied, is given by Grantors on or covering the aforesaid Tract 2, being the former right-of-way of Galveston-Houston Electric Railway Company; and also except as to the right-of-way easements and condemnation proceedings hereinafter mentioned; and also conditioned that the warranty of Houston Bank & Trust Company as Executor and Trustee of the Estate of John F. Garrott, deceased, and of Guardian Trust Company as Executor and Trustee of the Estate of Alevia Bute Hill, deceased, shall be binding on such estates only to the extent that such estates may be legally bound. The title to the above property and premises is presently vested in Grantors in the following proportions, to wit:

Houston Bank & Trust Company, Independent Executor and Trustee under the Will of John F. Garrott, deceased, 1/2 thereof; Bertha B. Day 1/8 thereof; Dorothy Elizabeth Franklin 1/8 thereof; Agnes B. Nickle 1/16 thereof; Guardian Trust Company Executor and Trustee under the Will of Alevia Bute Hill, deceased 1/16 thereof; James Bute III 1/32 thereof; Mary Elizabeth Nemeth 1/32 thereof; John Bute 1/32 thereof; Lois Bute Porter 1/32 thereof; and as a part of the consideration hereof, it is understood and agreed that the liability, if any, of the Grantors herein on any warranty hereunder, shall be several and not joint, and no Grantor shall ever be held on such warranty, should the title to such property fail, except for the proportionate interest of such Grantor in and to said property as hereinabove set forth. It is expressly agreed that this deed is executed by Grantors and accepted by Grantee, as being subject to the existence of the following easements and proceedings:

72 (a) That certain pipe line right-of-way easement dated November 4, 1920, recorded in Vol. 462, page 496 of the Harris County Deed Records from John Bute and R. A. Welsch Trustees of the Estate of James Bute and John F. Garrott and John Bute to S. M. Briscoe;

(b) That certain pipe line right-of-way easement dated October 30, 1920, recorded in Vol. 465, page 9 of the Harris County Deed Records, from John Bute and R. A. Welch, Trustees, of the Estate of James Bute, deceased; and John F. Garrott and John Bute to Gulf Pipe Line Company;

(c) An unrecorded easement for power line given to Houston Light & Power Company to cross the aforesaid property;

(d) Condemnation proceedings filed by the United States of America vs. James Bute et al., Civil Action No. 955 in District Court of the United States, all as reflected in Lis Pendens Notice recorded in Vol 7, page 218, Lis Pendens Record of Harris County, Texas. Taxes against the aforesaid property for the current year of 1945 have been prorated and ajusted between the parties hereto, and under such adjustment such taxes are to be paid by and are assumed by the Grantee.

EXECUTIVE as of the 1st day of November, A.D. 1945.

Houston Bank & Trust Company, in its capacity as Independent Executor and Trustee under the will and the Estate of John F. Garrott, deceased, and not individually, By O. R. Weyrich, President.

ATTEST: G. A. Holder, Cashier, (SEAL)

73

Bertha B. Day
Dorothy Elizabeth Franklin
Agnes B. Nickle
Donald C. Nickle—pro forma
James Bute III
John Bute
Mary Elizabeth Nemeth
Theodore J. Nemeth—pro forma
Lois Bute Porter
Randon Porter, Jr.,
By Lois Bute Porter His Agent
and Atty-in-fact Guardian Trust Co.,
in its capacity as Executor and Trustee
under the will and of the Estate of Alevia
Bute Hill, deceased, and not individually,
By J. S. Whitworth, Vice-Pres.

ATTEST: Norman Sterling, Asst. Secretary. (SEAL)

IN THE UNITED STATES DISTRICT COURT

Order Setting Aside Award of Commissioners—Filed, April 3, 1956

ON THIS day there came on for consideration the Motion filed herein on October 6, 1949, by Plaintiff, United States of America, praying for an Order of this Court, setting aside the Award of the Commissioners filed herein on November 16, 1948, which Motion was reiterated in Plaintiff's Motion for Summary Judgment, filed herein on
74 May 6, 1955. Upon consideration of the record in this cause, the Court finds that at the time of the Award, made and filed by the Commissioners on November 16, 1948, the Defendant, C. M. Dow was the only party-defendant in this proceeding as to Parcel No. 1; that thereafter, in 1954, several other persons and concerns were made parties-defendant; that said new parties, in effect, filed their Disclaimer and consented that the compensation for the taking of Parcel No. 1 might be paid to the Defendant, C. M. Dow; that on May 6, 1955, Plaintiff United States of America, filed its Motion for Summary Judgment, dismissing C. M. Dow and his claim for compensation; that such Motion has been granted by this Court, and C. M. Dow has been dismissed and is no longer a party to this proceeding, but, the Defendants, Houston Bank & Trust Company, Mrs. Bertha B. Day, Mrs. Agnes B. Nickle, Bank of the Southwest National Association, James Bute III, Mrs. Mary Elizabeth Nemeth, John Bute and Mrs. Lois Bute Porter, have filed their Motion herein to Withdraw their Answer and Disclaimer filed herein on the 24th day of June, 1956, and are now claiming the compensation due for the taking of said Parcel No. 1.

It is accordingly ORDERED by the Court that the Award of the Commissioners as to Parcel No. 1, filed herein while C. M. Dow was the only Defendant in Court as to said Parcel, shall be and the same is hereby set aside and held for naught.

In open Court, counsel for Plaintiff, United States of America, waived notice of the Motion filed by the Defendants, Houston Bank & Trust Company, et al, to withdraw the Answer and Disclaimer previously filed herein on June

24, 1955, and consented that such Motion might be granted; therefore, it is accordingly ORDERED by the Court that the said Defendants may withdraw their said Answer and Disclaimer, filed by them on June 24, 1955, and that this cause shall henceforth be prosecuted to conclusion in accord with Rule No. 71-A.

ORDERED at Houston, Texas, on this the 3rd day of April, 1956.

BEN C. CONNALLY
United States District Judge

O.K.
SCOTT W. KEY,
Asst. U. S. Atty.

IN THE UNITED STATES DISTRICT COURT

Notice of Appeal by C. M. Dow—Filed. April 17, 1956

Notice is hereby given that C. M. Dow, defendant in the above entitled and numbered cause, and claimant to Parcel No. 1 in said cause, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Summary Judgment dismissing C. M. Dow as a party defendant, entered in this action on the 29th day of March, 1956.

Dated at Houston, Texas, this 16th day of April, 1956.

FULBRIGHT, CROOKER, FREEMAN, BATES & JAWORSKI

By L. KEITH SIMMER
L. Keith Simmer
1201 South Coast Life Bldg.
Houston 2, Texas
Attorneys for Appellant, C. M. Dow

76 **Cost Bond on Appeal**

(omitted in printing)

* * *

77 IN THE UNITED STATES DISTRICT COURT

Statement of Points on Appeal—Filed, April 17, 1956

Appellant, C. M. Dow, will rely upon the following points on his appeal:

1. The court erred in granting the motion for summary judgment of the United States of America dismissing C. M. Dow's claim to Parcel No. 1 and the award for same and dismissing C. M. Dow as a party defendant.

78 2. The court erred in holding and concluding that the deed to C. M. Dow dated November 1, 1945, covering the lands including said Parcel No. 1, was a prohibited assignment of a claim against the United States of America.

3. The court erred in holding that appellant, C. M. Dow, has no enforceable claim to the said Parcel No. 1 or to the compensation to be awarded for said Parcel No. 1.

FULBRIGHT, CROOKER, FREEMAN, BATES & JAWORSKI

By L. KEITH SIMMER
L. Keith Simmer
1201 South Coast Life Bldg.
Houston 2, Texas
Attorneys for Appellant, C. M. Dow

IN THE UNITED STATES DISTRICT COURT

Stipulation for a Supplemental Record—Filed, May 14, 1956

WHEREAS, the Defendant C. M. Dow has heretofore given notice of appeal from a judgment of this Court, dismissing this claim to the compensation to be paid for the taking of Parcel No. 1, and the record on such appeal has heretofore been designated and has been prepared by the Clerk of the Court; and

WHEREAS, through error there was omitted from such record on appeal Defendant C. M. Dow's answer to the

motion of the United States of America for Summary Judgment Dismissing the Claim of said Defendant, filed on or about June 24, 1955.

79 NOW, THEREFORE, it is AGREED by the parties to such appeal that the Clerk of this Court may prepare and transmit a supplemental record, including this Stipulation and the said above mentioned instrument.

UNITED STATES OF AMERICA

By SCOTT W. KEY
Assistant United States Attorney

FULBRIGHT, CROOKER, FREEMAN, BATES & JAWORSKI
By L. KEITH SIMMER
Attorneys for C. M. Dow.

IN THE UNITED STATES DISTRICT COURT

Defendant C. M. Dow's Answer to Motion for a Summary Judgment Dismissing the Claim of said Defendant—Filed, June 24, 1955

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES C. M. Dow, one of the defendants herein, and files this his answer to the motion for summary judgment dismissing his claim filed herein on or about May 6, 1955, by plaintiff, United States of America, and for such answer would respectfully show unto the Court as follows:

I.

That on or about October 6, 1949, the United States of America filed in this cause a motion to set aside the Commissioner's Award upon the ground that this defendant, C. M. Dow, was not the only person entitled to compensation. It was stated on behalf of the United States of America in said earlier motion that:

80 "The Government is not asking the Court to deny the claim of C. M. Dow or to dismiss him from the proceeding, but * * * it is insisting that the former owners of the land should be made parties to the proceeding * * *."

The 1949 motion to set aside the Award theretofore made, upon hearing, was refused, such refusal being without prejudice to its refiling.

Thereafter by notice of condemnation the United States of America made the former owners of Parcel No. 1 parties to this proceeding; said former owners have appeared by appropriate pleading and urge the Court to pay the award for this land to defendant, C. M. Dow. No conflict of interest between the present owner of the land, C. M. Dow, and the former owners is presented and final judgment of condemnation will carry the full title to the United States of America and such judgment will be binding on the present owner and former owners alike.

II.

Under the circumstances present in this case, as stated above, defendant, C. M. Dow, is a proper and necessary party and is entitled to the award of just compensation for Parcel No. 1. Every interest and concern of the United States of America has been and is being fully protected in this case. When the original hearing before Commissioners was held, C. M. Dow, as purchaser pending condemnation, was entitled to the award and was a proper party to appear and give evidence of the value of Parcel No. 1. He still is a proper party and under settled law is entitled to the award to be made by final judgment herein.

81 Said defendant moves the Court to deny both motions of the United States of America—to dismiss him and to set aside the award—and files and presents along with this answer his brief in opposition to the United States of America's motion in this case.

WHEREFORE, premises considered, defendant, C. M. Dow, prays that the motions of the United States of America to dismiss him from this suit and to set aside the award for Parcel No. 1 be in all things refused and denied and further prays that he be awarded the just compensation

heretofore fixed by the Commissioners together with all legal interest on such award.

L. KEITH SIMMER
L. Keith Simmer, Attorney for Defendant, C. M. Dow
1201 Second National Bank Bldg.
Houston 2, Texas

OF COUNSEL:
Fulbright, Crooker, Freeman,
Bates & Jaworski

CERTIFICATE OF SERVICE

A copy of the foregoing answer has been served on the Hon. Scott W. Key, Assistant United States Attorney for the United States of America, Post Office Building, Houston, 2, Texas, and on Edward A. Kelly of Franklin Kelly & Graham, Cotton Exchange Building, Houston 2, Texas, attorneys for Houston Bank & Trust Company Trustee, et al, by delivering same to their addresses above given on this 24th day of June, A.D., 1955.

L. KEITH SIMMER
L. Keith Simmer

82 **Clerk's Certificate to Foregoing Transcript**

(omitted in printing)

* * *

83 IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Argument and Submission—Filed, Nov. 13, 1956

(omitted in printing)

* * *

84 IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 16125

C. M. Dow, *Appellant*,

VERSUS

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court for the Southern District of Texas

Opinion—Filed, December 11, 1956

Before RIVES, TUTTLE and CAMERON, Circuit Judges.

RIVES, Circuit Judge: This appeal is from a summary judgment dismissing C. M. Dow as a party defendant in a condemnation proceeding which, in accordance with Rule 54(b), F.R.C.P., was entered as a final and appealable judgment.

85 The United States commenced proceedings to condemn an easement for a pipe line right of way on March 9, 1943, and shortly thereafter went into possession of the easement pursuant to an order obtained under the Second War Powers Act of 1942, 56 Stat. 177.[1] More than two years thereafter, on November 1, 1945, Dow acquired by deed, made subject to the condemnation proceedings, 617.289 acres of land which included 2.7139 acres within the right of way. Seven months thereafter, on May 31, 1946, the Government filed a declaration of taking and deposited estimated compensation for the taking of Parcel No. 1, the particular 2.7139 acres.[2]

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[1] "* * * The Secretary of War * * * may acquire * * * by condemnation, any real property, temporary use thereof, or other interest therein * * *.

"Upon or after the filing of the condemnation petition, immediate possession may be taken and the property may be occupied, used and improved for the purposes of this Act, notwithstanding any other law."

[2] Pursuant to 40 U.S.C.A. 258(a), providing in pertinent part as follows:

"In any proceeding * * * for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described

86 Commissioners appointed by the Court under the Texas practice held a hearing at which Dow appeared and offered evidence as to value. The Commissioners' report awarded $4,500.00 as compensation for the taking of Parcel No. 1. Dow's vendors, or their heirs or representatives, were not served with notice, and did not appear at the compensation hearing. After the report, however, the Government's attorney reached the conclusion that Dow was not entitled to compensation for the taking of Parcel No. 1, and moved to set aside the award alleging that the parties entitled to compensation were neither served nor present at the commissioners' hearing; and moved also for a summary judgment dismissing Dow's claim on the ground that his deed was a prohibited assignment of a claim against the Government.[3]

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in the petition, declaring that said lands are thereby taken for the use of the United States. * * *.

"Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein * * *.

"Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency."

[3] Under the Anti-Assignment Act, 31 U.S.C.A. 203, providing in pertinent part as follows:

"All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, except as hereinafter provided, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. * * *."

Answering said motion, Dow reiterated his claim. Notwithstanding the fact that his vendors appeared and filed a waiver to any compensation due from the Government and requested that the award be paid to Dow,[4] the motion for summary judgment dismissing Dow was granted and this appeal followed.

87

The sole question for decision is whether the act prohibiting assignment of claims against the United States bars Dow's claim to compensation, he having purchased after possession had been awarded in the proceedings but prior to the filing of a declaration of taking. Under the explicit provisions of the Anti-Assignment Statute, a claim to compensation for a taking of property cannot be voluntarily transferred after it has arisen.[5] Otherwise stated then, the question is whether the taking occurred and the claim arose when the United States went into possession of the easement pursuant to the order of possession,[6] or subsequently upon the filing of the declaration of taking and of the deposit in the court.[7]

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[4] By leave of the court, requested just before and granted after Dow had been dismissed, this appearance and disclaimer were withdrawn. The findings of fact accompanying Dow's dismissal recited that his vendors "appeared in this proceeding and made known to the Court that their conveyance of November 1, 1945, to C. M. Dow was intended by them to include all their right, title and interest in the said Parcel No. 1 or in the award to be made for same."

[5] See, e.g., United States v. Shannon, 342 U.S. 288; 23 Tracts of Land v. United States, 177 F. 2d 967, (6th Cir.).

[6] Providing in part:

"Leave * * * is hereby granted the United States of America to take immediate possession of said land * * * *to the extent of the interest to be acquired by the United States of America* * * *," (Emphasis supplied.)

[7] The judgment entered thereon provided:

"It is therefore, ORDERED, ADJUDGED and DECREED that upon the filing of said Declaration of Taking, and the depositing in the Registry of this Court of the sum of $3801.30, a perpetual right of way or easement for the construction, operation, maintenance, patrol, repair, replacement and removal of a pipe line * * * vested in the United States of America * * * and said lands are deemed to have been condemned and taken for the use of the United States of America, *and the rights to just compensation for the property taken, upon the filing of said Declaration of Taking and making of said deposit, vested in the persons entitled thereto* * * *." (Emphasis supplied.)

88 The Government insists that when it took possession there was a taking of the property, and that thereupon the claim to compensation arose. Concededly, however, the United States was free to abandon the condemenation at any time before filing its declaration of taking.[8] In such an event, the United States would have become liable for actual use and occupancy with restoration damage.[9] Such liability did not actually accrue. Instead, upon the filing of the declaration of taking the United States became irrevocably committed to the payment of the ultimate award.[10] The Government then took title to the easement, whereupon the claim for compensation arose and vested in the owner, Dow. Theretofore the taking was not complete. Cf. *United States v. Dickinson*, 331 U.S. 745, 749.

The Declaration of Taking Act fixed a definite time of taking and of accrual of the claim for compensation and removed much of the uncertainty theretofore existing.[11] Nothing herein said is inconsistent with, or is meant to change, the equitable rule that where the declara-
89 tion of taking is filed on a date subsequent to the passing of possession to the Government, the value of the property should be determined as of the date possession was acquired.[12]

The judgment is reversed and the cause remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

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[8] O'Connor v. United States, 9th Cir., 155 F. 2d. 425; Moody v. Wickard, D.C. Cir., 136 F. 2d 801; United States v. One Parcel of Land, D.C. Cir., 131 F.Supp. 443.

"Until taking, the condemnor may discontinue or abandon his effort." Danforth v. United States, 308 U.S. 271, at p. 284.

[9] Cherokee Nation v. South Kansas Ry., 135 U.S. 641, 660, and authorities cited in Footnote 7, supra.

[10] 40 U.S.C.A. 258(e); Catlin v. United States, 324 U.S. 229, 241, 242.

[11] See Danforth v. United States, 308 U.S. 270, 283-284; United States v. 8677 Acre of Land in Richland County, 42 F.Supp. 91; United States v. 40,379 Square Feet of Land, 58 F.Supp. 246; 6 Nichols, "Eminent Domain", § 27.25, p. 321.

[12] 11,000 Acres of Land, etc. v. United States, 5th Cir., 1952 F. 2d. 566; Anderson v. United States, 5th Cir., 179 F. 2d. 281.

90 IN UNITED STATES COURT OF APPEALS

No. 16125

C. M. Dow,

VERSUS

United States of America.

Judgment—Filed, Dec. 11, 1956

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings consistent with the opinion of this Court.

* * * * * *

91 IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Title omitted]

Petition of the Appellee for Rehearing and Request That Such Hearing be Had En Banc—Filed, Dec. 28, 1956

Comes now the United States, appellee in the above-entitled cause, and presents this petition for rehearing and requests that such hearing be had *en banc*, and in support thereof respectfully shows:

1. *The holding of this Court that it was only upon the passage of title to the United States that a "claim for compensation arose and vested in the owner" is clearly erroneous.*—Title to an interest in property acquired by the United States in exercise of its power of eminent domain *never* passes until payment. When the power is exercised, as it may be, by physical seizure of the property and execution of the government purpose leaving the landowner to his suit under the Tucker Act that
92 transfer of title occurs only when the United States

pays the judgment.[1] In ordinary condemnation proceedings title likewise does not pass until the United States pays the judgment determining compensation. In only one instance does title ever pass prior to complete payment. That occurs when the acquiring agency chooses to exercise the authority granted by the Declaration of Taking Act. When that ancillary procedure is invoked by the making of part payment, a defeasible title passes to the United States. Since the title is defeasible, this procedure is no exception to the principle that "The owner is protected by the rule that title does not pass until compensation has been ascertained and paid, nor a right to the possession until reasonable, certain and adequate provision is made for obtaining just compensation." *Hanson Co.* v. *United States*, 261 U. S. 581, 587 (1923). This authority of federal agents, as contrasted with the officers of many states, rests upon the fact that "When land is taken for public use, the Fifth Amendment requires that just compensation be paid to the owner, but it does not, as some State constitutions do, direct that payment to be 'first' made in advance of the taking." *Garrow* v. *United States*, 131 F. 2d 724, 726 (C. A. 5, 1942), certiorari denied, 318 U. S. 765.

"Taking" in Tucker Act cases necessarily means physical entry upon property in physical deprivation of the owner's right to use it and not taking of title. Other-
93 wise a plaintiff could never show a right to compensation because it would only arise on entry of judgment. The distinction between a taking and a transfer of title was made clear long ago in *United States* v. *Lynah*, 188 U. S. 445, 470-471 (1903):

> It is clear from these authorities that where the government by the construction of a dam or other public works so floods lands belonging to an individual as to substantially destroy their value there is a taking within the scope of the Fifth Amendment. While the government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done it is of little consequence in whom the

[1] Of course, in cases where recovery would otherwise be permitted under the Tucker Act, the failure of the claimant to bring his case within the six year period of limitation has the same effect as payment.

fee may be vested. Of course, it results from this that the proceeding must be regarded as an actual appropriation of the land, including the possession, the right of possession and the fee; and when the amount awarded as compensation is paid the title, the fee, with whatever rights may attach thereto—in this case those at least which belong to a riparian proprietor—pass to the government and it becomes henceforth the full owner.[2]

The most important consequences of taking are threefold. From that date the Government is obligated to pay compensation. If that payment is delayed a remedy must be accorded to the owners, usually represented by interest. The date of taking fixes the date of valuation. And the date of taking is the date when the claim for compensation arises and, consequently, the right in the owner to sue under the Tucker Act, if a remedy is not available to him in a pending condemnation proceeding, then accrues. These principles equally apply whether the taking is a result of a court order authorizing a taking of possession[3] or is without court order.

94

The fact that unfil title has vested the United States may change its intention to take the property permanently, abandon the permanent fee taking proceeding and compensate the owner simply for what it has taken does not change the fact that there has been a taking. It merely mean sthat the extent of that taking may not be absolutely fixed until title passes. Similarly, when the taking is not accompanied by condemnation proceedings, the extent of the taking may be a matter for litigation and findings under the Tucker Act. *United States* v. *Causby*, 328 U. S. 256

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[2] An earlier expression of the same view is *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166, 181 (1871), where the court said:

> But we are of the opinion that * * * where real estate is actually invaded by superinduced additions of water, earth, sand or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution * * *.

[3] There are various statutes authorizing entry of such orders of possession and the authority exists absent any statute. *Commercial Station Post Office* v. *United States*, 48 F. 2d 183 (C. A. 8, 1931).

(1945). Every case holding that there has been a taking prior to passage of title is an implicit recognition of this fact.

In short, all of the federal appellate decisions have recognized that a taking occurs when possession of the property is taken or the owner is physically excluded from it in whole or part. No appellate decision to our
95 knowledge has heretofore held that despite physical possession, a taking did not occur until a later filing of a declaration of taking.[4] Nor has it been heretofore suggested that date of valuation does not accord with the date of taking.

2. *The holding is in conflict with decisions of this and other federal courts of appeal.*—The Court of Appeals for the Sixth Circuit has held the exact opposite of this present decision for purposes of determining when the right to compensation arises within the meaning of the Anti-Assignment of Claims Act. *23 Tracts of Land* v. *United States*, 177 F. 2d 967 (C. A. 6, 1949).

This Court, in at least three cases, has held that a taking occurs upon entry into possession by the United States, rather than upon the later filing of a declaration of taking, for purposes not only of determining the date of valuation but also for determining the date from which interest arising because of delay in payment commences. *United States* v. *Vilbig*, 208 F. 2d 663 (C. A. 5, 1953); *Anderson* v. *United States*, 179 F. 2d 281 (C. A. 5, 1950), certiorari denied, 339 U. S. 965; *11,000 Acres of Land, Etc.* v. *United States*; 152 F. 2d 566 (C. A. 5, 1945), certiorari denied, 328 U. S. 835, and cases there cited. The same result has been reached by other courts of appeal. *Comparet* v. *United States*, 164 F. 2d 452 (C. A. 10, 1947); *Bank of Edenton* v. *United*
96 *States*, 152 F. 2d 251 (C. A. 4, 1945); *United States* v. *6.87 Acres of Land, Etc.*, 147 F. 2d 351 (C. A. 2, 1945). None of these cases suggest either (a) a difference in rules depending whether the issue as to date of taking

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[4] *Danforth* v. *United States*, 308 U. S. 271 (1939), clearly does not do so. Instead, recognizing all of the principles we have stated, it held that there had been no physical invasion or interference with the owner's use of his property. It said there was no taking "in actuality."

arises in Tucker Act proceedings or in a condemnation case,[5] or (b) a different date of taking for determining when the claim to compensation arises, who is entitled to be paid compensation, or who is entitled to interest or other payment because compensation was not paid when due.

3. *The issue is so important as to require consideration by the full bench of this Court.*—We realize that the mere fact that a decision is erroneous and is in conflict with previous decisions of this Court is not adequate grounds for re-examination by the full bench of this Court. However, we believe, for reasons now to be stated that a full bench hearing is called for here.

Landowners' rights would be seriously affected. The decision would deprive them of any claim for interest or other compensation for delay in payment, even though the United States has taken possession, until such time as the Government chooses to file a declaration of taking or, if it does not do so, until final judgment. This is a necessary result of the conclusion that the claim for compensation only arises when title passes. In view of the continuous volume of federal condemnation proceedings and the inevitable delays before final judgment is entered or
97 a declaration of taking filed, the importance of such deprivation to landowners is obvious.

The landowner's ability to transfer the property is seriously impaired by this decision. The taking of easements rather than complete title is very frequent today notably for flowage purposes and for airfield purposes. The decision means that the owner of property where possession of the easement has been taken must, in order to sell his property at its real value, persuade his vendee to buy a lawsuit. The impediments thrown upon the marketability of property need not be elaborated.

The decision also creates practical difficulties for the condemnor. Heretofore it had been believed sufficient to extend title searches simply to the date of taking possession and to conduct settlement negotiations with the owner of

[5] Indeed this Court in the *11,000 Acres* case relied primarily upon Tucker Act decisions.

the property at that date. The necessity of constant extension of title searches is especially burdensome as applied to easements and rights-of-way like the one here concerned for a pipeline which requires dealing with the owners of many tracts of land each of whom will have a claim of only a relatively small amount. For example, Dow's claim relates to 2.7 acres out of a 617-acre farm. Governmental processing of such projects will become inordinately expensive.

Beyond these immediate effects the decision creates confusion and doubt as to one of the fundamentals in exercise of the federal power of eminent domain. It extends beyond the various aspects in which date of taking is important in condemnation proceedings and raises the
98 question whether a Tucker Act suit may be maintained at all.

We submit that these matters are so important to the conduct of condemnation proceedings that they should be resolved by all of the judges of this Court.

CONCLUSION

Wherefore, for the foregoing reasons, appellee submits that a rehearing should be granted and requests that such rehearing be *en banc*.

Respectfully submitted.

/s/ PERRY W. MORTON
Perry W. Morton,
Assistant Attorney General,

/s/ ROGER P. MARQUIS
Roger P. Marquis,

RICHARD C. PEET,
Attorneys,
Department of Justice,
Washington, D. C.

DECEMBER 1956.

CERTIFICATE OF COUNSEL

I, Roger P. Marquis, counsel for appellee in the above-entitled cause, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for the purpose of delay.

/s/ Roger P. Marquis
Roger P. Marquis

ACKNOWLEDGMENT OF SERVICE

Receipt is hereby acknowledged of two copies of the Petition of the Appellee for Rehearing *en banc* in the above-entitled case.

/s/ L. Keith Simmer
L. Keith Simmer

December 28, 1956
DATE

99 — IN UNITED STATES DISTRICT COURT

[Title omitted]

Order Denying Rehearing—Filed Jan. 3, 1957

It is ordered by the Court that the petition for rehearing filed in this cause, be, and the same is hereby, denied.

100 CLERK'S CERTIFICATE TO FOREGOING TRANSCRIPT

(omitted in printing)

* * * * *

101 SUPREME COURT OF THE UNITED STATES

[Title omitted]

Order Extending Time to File Petition for Writ of Certiorari—

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including—
April 19th, 1957.

HUGO L. BLACK
Associate Justice of the Supreme Court of the United States.

Dated this 1st
day of April, 1957.

102 SUPREME COURT OF THE UNITED STATES

[Title omitted]

Order Allowing Certiorari—Filed, May 27, 1957

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.